Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I, Pages 1–530

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA, PETITIONER
v.
UNITED STATES GYPSUM COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

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DX (Brown) 37..... 3376
DX (Brown) 38..... 3377
DX (Brown) 41..... 3379
DX (Brown) 43..... 3380
DX (Brown) 45..... 3381
DX (Brown) 48..... 3383
DX (Brown) 49..... 3385
DX (Brown) 50..... 3387
DX (Brown) 51..... 3389
DX (Brown) 55..... 3391
DX (Brown) 57..... 3392
Watt: DX (Watt) 1..... 3394
Defendants' joint exhibits:
DJX 1 3395
DJX 2 3401
DJX 12 3403
DJX 14 3405
DJX 16 3407
DJX 18 3409
DJX 20 3411
DJX 22 3413
DJX 24 3415
DJX 26 3417
DJX 28 3419
DJX 30 3421
DJX 32 3423
DJX 34..... 3425
DJX 36 3427

Defendants' exhibits—Continued
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DJX 38 3429
DJX 40 3431
DJX 42 3433
DJX 43 3435
DJX 45 3443
DJX 47 3445
DJX 49 3447
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DJX 53 3451
DJX 55 3453
DJX 57 3455
DJX 59 3457
DJX 61 3459
DJX 63 3461
DJX 65 4363
DJX 67 3465
DJX 69 3467
DJX 71 3469
DJX 73 3471
DJX 75 3473
DJX 77 3475
DJX 79 3477
Supreme Court's Order of October 3, 1977, granting the petition for a writ of certiorari 3479

DOCKET ENTRIES

Dec. 27, 1973. True bill.
Dec. 27, 1973. Indictment filed.
Dec. 27, 1973. Request of U S Atty for summons—appear by 1/11/74 to file appearance of counsel: U S Gypsum Co, Natl Gypsum Co, Georgia Pacific Corp, Kaiser Gypsum Co, Inc, Cellotex Corp, Flintkote Co.
Dec. 27, 1973. Summons issued for above named.
Dec. 27, 1973. Request by U S Atty for summons—by 1/11/74, file appearance of counsel and post $1000 own recog bond each: Graham J Morgan, Andrew J Watt, Colon Brown, J P Nicely, William H Hunt, Claude E Harper, Robert A Costa, William D Herbert, George J Pecaro, James D Moran.
Dec. 27, 1973. Summons issued for above named.
Dec. 27, 1973. Transcript of proceedings in grand jury return filed (rep J. Goodworth).
Jan. 2, 1974. Praecipe for appearance for Wm. Hunt by Malcolmn Anderson, Esq. & E Narick.
Jan. 7, 1974. Praecipe for appearance for Kaiser Gypsum Co Inc filed.
Jan. 9, 1974. Praecipe for appearance of Alexander Unkovic for Flintkote Co, George J Pecaro and James D Moran filed.
Jan. 9, 1974. $1000 O. R. for George J Pecaro taken in S. Dist of New York, recd.
Jan. 9, 1974. $1000 O. R. for James D Moran taken in S. Dist. of N. Y. recd and filed.
Jan 10, 1974. $1000 O.R. bond for William Herbert taken in Middle Dist Fla and filed.
Jan. 10, 1974. Praecipe for appearance for Georgia Pacific Corp.
Jan. 10, 1974. Praecipe for appearance for Colon Brown and J P Nicely filed.
Jan. 10, 1974. Praecipe for appearance for National LGypsum Co filed.

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Jan. 10, 1974. Praecipe for appearance for Celotex and Wm. D Herbert by Reed, Smith.

Jan. 10, 1974. Praecipe for appearance for National Gypsum Co by Wm. L Rieth filed.

Jan. 10, 1974. Order ent, after Reed, Smith, Shaw & McClay ent appearance, directing case be assigned to another judge for disposition (28, 455) (Marsh, J).

Jan. 11, 1974. $1000 O.R. bond for Graham Morgan taken in N Dist of Illinois, recd & filed.

Jan. 11, 1974. $1000 O.R. bond for Andrew Watt taken in N. Dist Illinois, recd & filed.

Jan. 11, 1974. Praecipe for appearance for U S Gypsum Co, Graham J Morgan and Andrew Watt.

Jan. 14, 1974. $1000 O.R. bond for J P Nicely recd from W. Dist of N Y and filed.

Jan. 14, 1974. $1000 O.R. bond for Colon Brown rcd from W. Dist of N Y and filed.

Jan. 14, 1974. $1000 O. R. bond for Robert A Costa recd from N Dist Calif and filed.

Jan. 15, 1974. Praecipe for appearance for Robert A Costa filed.

Jan. 15, 1974. Order ent extending time limit for arraignment to 1/28/74 (Teitelbaum, J).

Jan. 15, 1974. Notice setting arraignment for 1/28 at 1:30 PM before Mgstr Sensenich and to be followed by pretrial conference before Judge Teitelbaum.

Jan. 18, 1974. Praecipe for appearance for Claude E Harper filed.

Jan. 21, 1974. $1000 O.R. bond for Claude E Harper taken in Hawaii recd and filed.

Jan. 23, 1974. Praecipe for appearance for Claude Harper filed by John Doherty, Esq.

Jan. 24, 1974. Praecipe for appearance for Flintkote Co filed by Pillsbury, Madison, Sutro.

Jan. 24, 1974. Motion to voluntarily absent himself from arraignment and pretrial set for 1/28 filed by deft Claude E Harper with consent to permit Atty to enter a Not Guilty plea and order ent granting motion (Teitelbaum, J).

Jan. 24, 1974. Motion to withdraw appearance of counsel for Claude E Harper filed by Dickie, McCamey & Chilcote. Esqrs and Thelen, Marrin, Johnson, Bridges, Esqrs and order ent granting same (Teitelbaum, J).

Jan. 28, 1974. Waiver of removal hearing as to deft Wm. H Hunt recd from Dist of Oregon.

Jan. 28, 1974. $1000 own recog bond for deft WM. E. HUNT recd from Dist of Oregon.

Jan. 28, 1974. Motion by defts for extension of time for filing motions with proposed order.

Jan. 28, 1974. Summonses ret served on U S Gypsum Co., Natl Gypsum Co, Georgia Pacific, Kaiser Gypsum, Cellotex Corp, Flintkote Co, on 12/27/73—by certif mail.

Jan. 28, 1974. NOT GUILTY PLEAS ent before Mgstr Sensenich as to all 16 defts.

Jan. 28, 1974. Mgstr report of arraignments before Mgstr Sensenich filed.

Jan. 28, 1974. Order ent, attached to motion, extending time to 4/1/74 for filing motions (Teitelbaum, J).

Jan. 28, 1974. Hearing on motion to extend time for filing motions held before Teitelbaum, J—Memo filed—(rep J Goodworth) order ent (see #24)

Jan. 29, 1974. Summonses ret served on 12/27 by Marshal on Colon Brown, J. P. Nicely, Claude E Harper, Robert A. Costa by certified mail.

Jan. 29, 1974. Summonses ret served on 12/27 by Marshal on Graham J Morgan, George Pecaro, James D Moran by certified mail.

Feb. 6, 1974. Waiver by deft Robert A Costa regarding conflict of interest of Attys.

Feb. 6, 1974. Waiver by deft Kaiser Gypsum Co regarding conflict of interest of Attys.

Feb. 6, 1974. Consent of deft Robert Costa to proceedings in his absence with proposed order.

Feb. 7, 1974. Consent of deft., James D. Moran to conduct proceedings in his absence and proposed order filed.

Feb. 7, 1974. Consent of deft. George J. Pecaro, to conduct proceedings in his absence and proposed order filed.

Feb. 7, 1974. Praecipe for appearance filed by William C. Miller, James J. Walsh, Gary H. Anderson and Pillsbury, Madison & Sutro as counsel for George J. Pecaro and James D. Moran.

Feb. 7, 1974. Waiver of James D. Moran of his right to separate counsel filed.

Feb. 7, 1974. Waiver of George J. Pecaro of his right to separate counsel filed.

Feb. 7, 1974. Waiver of the Flintkote Co. of its right to separate counsel filed.

Feb. 8, 1974. Waiver by U. S. Gypsum Co. regarding its attys' representation of another deft. filed.

Feb. 8, 1974. Waiver by Andrew J. Watt regarding his attys' representation of another deft. filed.

Feb. 8, 1974. Waiver by Graham J. Morgan regarding his attys' representation of another deft. filed.

Feb. 8, 1974. Consent of Andrew J. Watt to proceedings in his absence and proposed order filed.

Feb. 8, 1974. Consent of Graham J. Morgan to proceedings in his absence and proposed order filed.

Feb. 8, 1974. Waiver by deft Wm. D. Herbert regarding his atty's representation of another deft.

Feb. 8, 1974. Waiver by deft Celotex Corp regarding its attys' representation of another deft.

Feb. 11, 1974. Consent of deft. William H. Hunt to proceedings in his absence and proposed order filed.

Feb. 11, 1974. Waiver of deft Colon Brown of any appeal rights based on his counsel's representation of J P Nicely filed.

Feb. 11, 1974. Transcript of pretrial conf held 1/28 before Teitelbaum, J (rep J Goodworth).

Feb. 11, 1974. Order ent directing consent of Robt A Costa to proceedings in his absence be filed (Teitelbaum, J).

Feb. 11, 1974. Order ent directing consent of James D Moran to conduct proceedings in his absence be filed (Teitelbaum, J).

Feb. 11, 1974. Order ent directing consent of deft Georg J Pecaro to conduct proceedings in his absence be filed Teitelbaum, J).

Feb. 11, 1974. Order ent directing consent of Andrew J Watt to proceedings in his absence be filed (Teitelbaum, J).

Feb. 11, 1974. Order ent directing consent of Graham J Morgan to proceedings in his absence be filed (Teitelbaum, J).

Feb. 11, 1974. Order ent directing consent of Wm. H. Hunt to proceedings in his absence be filed (Teitelbaum, J).

Feb. 12, 1974. Transcript of proceedings held 1/24 before Teitelbaum, J (rep J Goodworth).

Feb. 12, 1974. Transcript of arraignments before Mgstr Sensenich on 1/28/74 (rep J. Goodworth).

Feb. 12, 1974. Transcript of hearing on motion for extension of time to filed motions held before Teitelbaum, J on 1/28/74 (rep J. Goodworth).

Feb. 13, 1974. Written consent of J P Nicely to the conduct of pretrial proceedings and trial in his absence with proposed order.

Feb. 13, 1974. Waiver of J P Nicely of any appeal rights based on his counsel's representation of Colon Brown filed.

Feb. 13, 1974. Written consent of deft Colon Brown to the conduct of pretrial proceedings and trial in his absence with proposed order.

Feb. 14, 1974. Memorandum order ent directing that no individual deft need be present during pretrial proceedings; Each indiv deft must be present at impaneling of jury and when sentence is imposed, sh that become necessary; Should indiv deft request to be absent during trial, form filed with Clerk will acknowledge his waiver to be present (Teitelbaum, J).

Feb. 14, 1974. Order ent, attached to consent, directing consent of Deft J P Nicely to conduct pretrial proceedings and trial in his absence (Teitelbaum, J) be filed.

Feb. 14, 1974. Order ent, attached to consent, directing consent of Colon Brown to the conduct of pretrial and trial in his absence be filed (Teitelbaum, J).

Feb. 22, 1974. Summons ret served on 12/27 on Andrew J Watt.

Feb. 22, 1974. Summons ret served on 12/27 on William H Hunt.

Feb. 22, 1974. Summons ret served on 12/27 on William D Herbert.

Feb. 28, 1974. Motion for bill of particulars and proposed order of court filed by defts.

Mar. 13, 1974. Notice setting arg on all pending motions for 3/21 at 2 PM.

Mar. 13, 1974. Defts' motion for discovery and inspection filed.

Mar. 18, 1974. Motion for bill of particulars filed by Wm. Hunt with proposed order.

Mar. 21, 1974. Hearing on motion for bill of particulars and motion for discovery and inspection held before Teitelbaum, J–CAV–Memo filed (rep Thos Vivaro, for J Goodworth).

Mar. 21, 1974. Praecipe for appearance for defts Graham J Morgan and Andrew J Watt filed by Fred H Bartlit, Jr of Chicago Illinois.

Mar. 21, 1974. Motion for withdrawal of appearance of counsel filed and order ent granting withdrawal of Charles Price, Robt Keck, James Hiering, Douglass Rohrman and Price, Cushman, Keck, Mahin & Cate on behalf of defts Graham J Morgan and Andrew J Watt (Teitelbaum, J).

Mar. 29, 1974. Joint motions of defts, The Flintkote Co., George J. Pecaro and James D. Moran to dismiss the indictment or, in the alternative, to sever and transfer as to them to the Northern District of California filed.

Apr. 1, 1974. Supplemental motion to dismiss indictment and proposed order filed by defts. William H. Hunt and Georgia-Pacific Corp.

Apr. 1, 1974. Motions of defts Robt Costa, Claude Harper, and Kaiser Gypsum Co to dismiss indictment or to sever and transfer to the N. Dist of Calif filed with affidavits thereon.

Apr. 1, 1974. Motion to dismiss indictment filed by defts. The Flintkote Co., George J. Pecaro and James D. Moran.

Apr. 1, 1974. Supplemental motion of defts Morgan and Watt to dismiss indictment filed.

Apr. 1, 1974. Supple motions for dismiss filed by defts Colon Brown and J P Nicely.

Apr. 2, 1974. Consent of deft Wm D Herbert to proceedings in his absence.

Apr. 4, 1974. Transcript of pretrial held before Teitelbaum, J on 3/21/74 (rep Thomas Vivio).

Apr. 22, 1974. Motion by the prosecution for extension of time for replying to defts' motion for discovery and proposed order filed.

Apr. 23, 1974. Order ent, attached to motion, extending time to 5/6/74 for prosecution for filing reply to defts' motion for discovery and inspection (Teitelbaum, J).

May 2, 1974. Order ent directing discovery end by 7/1/74; Defts' brief on mot to dismiss due 5/31; U S Brief in opposition to mot to dismiss due by 7/1/74; in event defts' mot to dismiss is denied, jury trial is set for 10/3/74 (Teitelbaum, J).

May 7, 1974. Joint application for pretrial conference filed with proposed order.

May 7, 1974. Stipulation and revised motion for bill of particulars and proposed order filed re Withdrawal of certain motions.

May 8, 1974. Order ent, attached to stip, directing that pretrial conference be set for 5/16 at 3:30 P.M (Teitelbaum, J).

May 8, 1974. Agreed order directing attached stipulation and order be filed (Teitelbaum, J).

May 13, 1974. Motion for discovery under Fed. R. Crim. P. 16(c) filed by U.S. Atty.

May 16, 1974. Conference before Teitelbaum, J—CAV—Memo filed (rep J Goodworth).

May 24, 1974. Order ent superseding the schedule set in Order of Court dated 5/2/74 (Teitelbaum). (see order for more detailed information).

May 28, 1974. Changes in transcript of pretrial conference held 3/21 filed by J Gary Kosinski.

June 10, 1974. Motion to withdraw appearance of counsel for defts Kaiser Gypsum Co., Inc. and Robert A. Costa and proposed order filed by David J. Armstrong, Dickie, McCamey & Chilcote, M. Richard Dunlap, Charles W. Kenrick, Thelen, Marrin, Johnson & Bridges and Gordon Johnson.

June 10 1974. Praecipe for appearance filed by M. Richard Dunlap & Gordon Johnson, Esq. as counsel for Kaiser Gypsum Co., Inc.

June 10, 1974. Praecipe for appearance filed by David J. Armstrong & Charles W. Kenrick, Esq. as counsel for Robert A. Costa.

June 11, 1974. Order ent granting motion to withdraw as counsel for Kaiser Gypsum and Robt Costa by Dickie, McCamey & Chilcote, David J. Armstrong, M. Richard Dunlap, Charles W. Kenrick; Thelen, Marrin, Johnson, Bridges and Gordon Johnson (Teitelbaum, J).

June 13, 1974. Transcript of Pretrail Conf held 5/16/74 before Teitelbaum, J. filed.

June 18, 1974. Opinion filed and order ent denying motions to sever and transfer without prejudice to defts' rights to be heard on their separately filed motion to dismiss (Teitelbaum, J.).

June 24, 1974. Copy of letter to Judge Teitelbaum from David L McClenahan dated 6/20/74.

June 24, 1974. Affidavit in reply to individual defts' brief in opposition to rule 16 C Motion (affidavit of John C Fricano).

July 2, 1974. Opinion and order directing individual defts produce for inspection material to govt that they intend to produce at trial except those excluded by Rule 16(c). Indiv defts to comply with this order by 12/1/74 (Teitelbaum, J.).

July 3, 1974. Memorandum order ent directing that evidentiary hearing on those matters outside the face of the indictment raised by defts' motion to dismiss shall be held on 9/4 at 10 AM (Teitelbaum, J.).

July 9, 1974. Transcript of proceedings in re Grand Jury Return on 12/27/73 filed (rep J Goodworth).

July 17, 1974. Praecipe for appearance of Wm. H Hauser as counsel for Wm. H Hunt filed.

July 23, 1974. Order entered setting pre-evidentiary hearing conference for 8/1/74 at 2 P.M.; further ordered that the last sentence of Memorandum Order of 7/3/74 be amended to read as follows: Therefore, in accordance with Rule 12 (b)(4) of the Federal Rules, IT IS ORDERED that an evidentiary hearing on those matters outside the face of the indictment raised by deft's motion to dismiss shall be held on Monday, September 9, 1974 at 10 A.M. in Court Room No. 12, 10th Floor, United States Post Office & Courthouse, Pgh. Pa. (Teitelbaum, J).

Aug. 1, 1974. Praecipe for appearance for Flintkote Co by Stephen M Azinn, Wm. Frank, John V. Marinelli and Skadden, Arps, Slate, Meager & Flom filed.

Aug. 1, 1974. Conference held before Teitelbaum, J—Memo filed (rep M Brown) CAV.

Aug. 13, 1974. Transcript of proceedings of pre evidentiary hearing filed. (Rep. Brown).

Aug. 20, 1974. Notice of change of address filed by Celotex Corp.

Aug. 26, 1974. Bill of particulars filed by USA.

Aug. 27, 1974. Praecipe for appearance of S. M Axinn, A. Frank, J V Marinelli and Skadden, Arps, Slate, Meagher & Flom as counsel for George J Pecaro and James D Moran filed.

Sept. 3, 1974. Motion to quash subpoena duces tecum filed by U.S. Atty.

Sept. 4, 1974. Supplemental motion to quash subpoena duces tecum filed by U.S. Atty.

Sept. 9, 1974. Waiver of deft Graham J Morgan with regard to the absence of counsel. Fred H Bartlit, Jr., at evidentiary hearing beginning 9/9/74 filed.

Sept. 9, 1974. Supplemental affidavit of Stephen M Axinn filed.

Sept. 9, 1974. Separate stmt of defts The Flintkote Co. James D. Moran and Geo Pecaro with respect to gov't motion to quash the subpoena duces tecum for evidentiary hearing.

Sept. 9, 1974. Evidentiary hearing, mot to quash subp duces tecum, motion to dismiss held before Teitelbaum, J and contd to 9/10 (mot to quash denied orally, except re work products subject to camera inspection).

Sept. 10, 1974. Hearing continues before Teitelbaum, J.

Sept. 11, 1974. Hearing continues before Teitelbaum J.

Sept. 11, 1974. Stipulation regarding exhibits at 9/9 evidentiary hearing filed.

Sept. 12, 1974. Motion to quash govt subpoena duces tecum filed by defts.

Sept. 12, 1974. Hearing continues before Teitelbaum, J. from 9/11, (oral ruling that subpoena duces tecum quashed except forU S Gypsum and Law firms representing that plf).

Sept. 13, 1974. Hearing continues before Teitelbaum, J. concludes CAV–Memo filed (rep M Wike) (oral ruling, subpoena duces tecum quashed for U S Gypsum & law firms rep them) (exhibited sheet attached) (R. Grainer retained exhibits.

Sept. 13, 1974. Protective order ent (Teitelbaum, J).
(Defense counsel shall not use documents except for evidentiary hearing; and shall not reveal contents to any other person; All documents shall be ret to counsel of U S who shall retain documents; all notes or records made by defense counsel in inspection of documents, shall be delivered to Clerk for impounding (Teitelbaum, J).

Sept. 16, 1974. Transcript of proceedings on evidentiary hearing 9/9 before Teitelbaum, J (rep M Wike) Volumes 1 thru 5 (pages 1–1013).

Oct. 8, 1974. Objections of Wm. H. Hunt to bill of particulars filed.

Oct. 10, 1974. Defts' motion for further particulars and other relief and proposed order filed.

Oct. 21, 1974. OPINION and order ent denied motion of defts to dismiss; Jury selection to commence 1/20/75; Trial to commence 1/27/75 (Teitlbaum, J).

Oct. 21, 1974. Memorandum order ent denying motion on behalf of all defts and on behalf of deft Wm. H Hunt re: bill of particulars (Teitelbaum, J).

Oct. 24, 1974. Notice of change of address of Gordon Johnson, one of the Attys of record to Two Embarcadero Center, San Francisco, Calif 94111, filed.

Nov. 25, 1974. Supplemental bill of particulars filed by plf.

Dec. 2, 1974. Motion of Theodore E Armstrong, Sr, to quash subpoena ad testificandum or for protective order with memorandum in support of same attached.

Dec. 5, 1974. Transcript of pretrial conference held 12/4 before Teitelbaum, J (rep M Wike).

Dec. 9, 1974. Notice of change of address of Dechert Price & Rhoads, counsel for Natl Gypsum to 3400 Center Square West, 1500 Market St, Phil, Pa. 19102.

Dec. 9, 1974. Motion of U. S. to compel compliance with orders under Rule 16(c) of FRCP with proposed order filed.

Dec. 11, 1974. Certificate of service filed (sh have been attached to orig copy of Memo and motion of U S to compel compliance).

Dec. 10, 1974. Copy of order from Judge Parker, Dist of Columbia, requesting transcripts filed.

Dec. 16, 1974. Copy of letter advising documents #109, 110, 111, 112, 113, transcripts, forwarded to Judge Parker, for use, and will be ret to this Court.

Dec. 18, 1974. Hearing on conference held before Teitelbaum, J.—CAV—Memo filed (rep M Wike).

Dec. 18, 1974. Order ent, denying motion of U S to compel (attached to motion) (Teitelbaum, J).

Dec. 24, 1974. Transcript of proceedings of pretrial conference 12/18/74 filed. (Rep. Wike).

Jan. 3, 1975. Order ent setting hearing regarding change of plea of certain defts for 1/16/75 at 10 AM (Teitelbaum, J).

Jan. 6, 1975. Second supplemental bill of Particulars filed by Dept Justice.

Jan. 14, 1975. Motion to modify subpoena and proposed order filed by deft. Georgia-Pacific Corp.

Jan. 14, 1975. Motion to compel listing of Government witnesses and certain other information and proposed order filed by defts.

Jan. 16, 1975. Defts' motion to take nolo cont pleas in camera filed.

Jan. 16, 1975. NOLO CONTENDERE PLEAS ENT before Judge Teitelbaum by Kaiser Gypsum Co, Flintkote Graham J Morgan, Robert A Costa, Claude Harper (rep M Wike) also by William D Herbert, George J Pecaro, James D Moran, William H Hunt.

Jan. 16, 1975. Third supplemental bill of particulars filed by U S.

Jan. 16, 1975. Hearing re change pleas of certain defts in camera held before Teitelbaum, J. Memo filed (rep M Wike) (motion in camera proceeding denied orally) exh sheet attached.

Jan. 17, 1975. SENTENCE of 1/16: KAISER GYPSUM Co: Pay fine $50,000 and pay share costs to date. Fine and costs to be paid in 30 days (Teitelbaum, J (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 FLINTKOTE Co: Pay fine $50,000 and pay share costs to date. Fine and costs to be paid in 30 days (Teitelbaum, J (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of GRAHAM J MORGAN: Impr 6 mos. Ex pr sent susp placed on prob for 2 years. Pay fine $40,000 and pay share of costs to date. Fine and costs to be paid in 30 days (Teitelbaum, J (rep M Wike). Special condition of prob is that fine and costs are to be paid from deft's personal assets and deft shall not accept reimbursement from his corporation directly and indirectly.

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of WILLIAM H. HUNT: Impr 6 mos. Ex pr sent susp. placed on prob for 18 mos. Pay fine $40,000 and pay share of costs of prosecution to date. Fine and costs to be paid in 30 days. Special condition of probation is that fine and costs are to be paid from deft's personal assets and deft shall not accept reimbursement from corporation directly or indirectly (Teitelbaum, J (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of CLAUDE E. HARPER: Impr for 6 mos. Ex pr sent susp, placed on probation for 18 mos. Pay fine $40,000 and pay share of costs of prosecution to date. Fine and costs to be paid in 3 mos. Special condition of probation is that fine and costs are to be paid from deft's personal assets and deft shall not accept reimbursement from corporation directly or indirectly (Teitelbaum, J) (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of ROBERT A. COSTA: Impr 30 days. Ex pr sent susp, placed on probation for 1 yr. Pay fine $20,000 and pay share of costs of prosecution to date. Fine and costs to be paid in 30 days. Special condition of prob is that fine and costs be paid from deft's personal assets and deft shall not accept reimbursement from his corporation directly or indirectly (Teitelbaum, J) (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of WILLIAM D. HERBERT: Impr 30 days. Ex pr sent susp, placed on prob for 1 yr. Pay fine $20,000 and pay share of costs of proseq to date. Fine and costs to be paid in 30 days. Special condition of probation is that fine and costs be paid from deft's personal assets and deft shall not accept reimbursement from his corporation directly or indirectly (Teitelbaum, J) (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of GEORGE J. PECARO: Impr 30 days. Ex pr sent susp, placed on probation for 1 year. Pay fine $20,000 and pay share of costs of proseq to date. Fine and costs to be paid in 30 days. Special condition of prob is that fine and costs be paid from deft's personal assets and deft shall not accept reimbursement from his corporation directly or indirectly (Teitelbaum, J) (rep M. Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. SENTENCE of 1/16 of JAMES D. MORAN: Impr for 30 days. Ex pr sent susp, placed on prob for 1 yr. Pay fine $20,000 and pay share of costs of proseq to date. Fine and costs to be paid in 30 days. Special condition of prob is that fine and costs are to be paid from deft's personal assets and deft shall not accept reimbursement from his corporation directly or indirectly (Teitelbaum, J) (rep M Wike).

Jan. 17, 1975. cc issued and notice mailed.

Jan. 17, 1975. Defts' motion to strike second supple bill of particulars and 3rd supple bill of particulars filed with proposed order.

Jan. 17, 1975. Hearing on pending motions held before Teitelbaum, J—Memo filed (rep M Wike) (opinion and order to be ent) (contd to 2/18/75).

Jan. 17, 1975. Memorandum order ent denying motion to take the proferred nolo cont pleas in camera and to impound until conclusion of jury trial (Teitelbaum, J).

Jan. 23, 1975. Transcript of hearing on change of pleas on 1/16/75 before Teitelbaum, J (rep M Wike).

Jan. 23, 1975. Transcript of hearing on pretrial motions held 1/17/75 before Teitelbaum (rep M Wike).

Jan. 27, 1975. Fourth Supplemental bill of particulars filed by US.

Jan. 28, 1975. Order 1/27 denying defts motion for change venue; oral motion of defts for continuance is granted; Jury selection to commence 2/18; Defts' motion to strike 2nd supple bill of particulars and 3rd supple bill of particulars is denied; Deft Georgia Pacific's motion to modify subpoena is denied; defts; motion to compel listing of govt witnesses and certain information is denied (Teitelbaum, J).

Jan. 30, 1975. Certification of Resolution adopted by Bd of Directors of The Flintkote Co by George H Cain, filed.

Jan. 30, 1975. Fifth supple bill of particulars filed by plf.

Feb. 7, 1975. Motion by U S and certain defts for continuance of trial with proposed order.

Feb. 10, 1975. Order ent, attached to motion, contg case from 2/18 to 3/3 or such later date as Court may order (Teitelbaum, J).

Feb. 18, 1975. Order ent directing that subpoena and testificandum commanding Theodore E. Armstrong Sr to appear in Dist Court is hereby quashed (Teitelbaum, J).

Feb. 27, 1975. Defts' motion to strike fourth supplemental bill of particulars and fifth supplemental bill of particulars and proposed order filed.

Feb. 27, 1975. Conference before Teitelbaum, J—Memo filed (rep M Wike).
Feb. 28, 1975. proposed voir dire questions of U S Filed.
Feb. 28, 1975. Transcript of proceedings of 2/27/75 before Teitelbaum, J (rep M Wike).
Mar. 3, 1975. Defts' requests for preliminary instructions to jury filed.
Mar. 3, 1975. Defts' requests for voir dire examination of prospective jurors filed.
Mar. 3, 1975. Hearing on voir dire held before Teitelbaum, J—CAV—Memo filed (rep M Wike).
Mar. 3, 1975. Waiver of deft Colon Brown during questioning of jurors on voir dire filed.
Mar. 3, 1975. Waiver of deft J P Nicely to be present during questioning of jurors on voir dire.
Mar. 3, 1975. Waiver of deft Andrew J Watt to be present during questioning jurors on voir dire.
Mar. 3, 1975. (Jury selected 9:45 AM to 3:30 PM).
Mar. 4, 1975. Order ent 3/3 denying defts' motion to strike fourth supple bill of particulars and fifth supple bill of particulars (Teitelbaum, J).
Mar. 4, 1975. JURY TRIAL BEGUN BEFORE TEITELBAUM, J as to U S Gypsum, Natl Gypsum, Georgia Pacific, Celotex Corp, Andrew J Watt, Colon Brown, J P Nicely (see attached sheet.
Mar. 4, 1975. TRANSCRIPT of jury trial commencing 3/3 before Teitelbaum, J (rep M Wike).
Mar. 4, 1975. Praecipe for appearance for U S Gypsum Co filed by V. A. Weber, Jr., Esq.
Mar. 4, 1975. Stipulation re: no jurors filed.
Mar. 5, 1975. TRANSCRIPT of jury trial of 3/4 before Teitelbaum, J (rep M Wike).
Mar. 5, 1975. JURY TRIAL CONTINUES (no oral motions).
Mar. 6, 1975. TRANSCRIPT of jury trial on 3/5/75 before Teitelbaum, J. (Rep. M. Wike).
Mar. 6, 1975. JURY TRIAL CONTINUES. (no oral motions).
Mar. 7, 1975. Transcript of jury trial held 3/6 filed (rep M Wike).
Mar. 10, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J (no oral motions).

Mar. 11, 1975. TRANSCRIPT of jury trial 3/10 before Teitelbaum, J (rep M Wike).
Mar. 11, 1975. JURY TRIAL CONTINUES.
Mar. 12, 1975. TRANSCRIPT of jury trial 3/11 (rep M Wike).
Mar. 12, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J (no oral motions).
Mar. 13, 1975. JURY TRIAL CONTINUES (see sheet for oral motion).
Mar. 13, 1975. TRANSCRIPT of jury trial of 3/12 filed (rep M Wike).
Mar. 14, 1975. TRANSCRIPT of jury trial of 3/13 (volume 8) filed (rep M Wike).
Mar. 17, 1975. JURY TRIAL CONTINUES (no oral motions).
Mar. 18, 1975. JURY TRIAL CONTINUES.
Mar. 18, 1975. TRANSCRIPT of jury trial commencing 3/13 before Teitelbaum, J (rep M Wike).
Mar. 18, 1975. Notice of change of address of Price, Cushman, Keck, Mahin, & Cate filed.
Mar. 19, 1975. JURY TRIAL CONTINUES (see attached sheet for oral motion).
Mar. 19, 1975. TRANSCRIPT of jury trial of 3/18 before Teitelbaum, J (rep M Wike).
Mar. 20, 1975. JURY TRIAL CONTINUES (see attached sheet for oral motions).
Mar. 20, 1975. TRANSCRIPT of jury trial 3/19 before Teitelbaum, J (rep M Wike).
Mar. 24, 1975. TRANSCRIPT of jury trial of 3/20 (rep M Wike).
Mar. 24, 1975. JURY TRIAL CONTINUES (no oral motions).
Mar. 25, 1975. TRANSCRIPT of jury trial 3/24/75 (rep M Wike).
Mar. 25, 1975. JURY TRIAL CONTINUES (no oral motions).
Mar. 25, 1975. Order to compel testimony of Malcolm Meyer filed (Teitelbaum, J).
Mar. 26, 1975. TRANSCRIPT of jury trial 3/25 filed (rep M Wike).
Mar. 26, 1975. JURY TRIAL CONTINUES (no oral motions).
Mar. 27, 1975. JURY TRIAL CONTINUES.
Mar. 27, 1975. TRANSCRIPT of jury trial 3/26 (volume 15) (rep M Wike).
Mar. 31, 1975. TRANSCRIPT of jury trial on 3/27 (volume 16) filed (rep M wike).
Mar. 31, 1975. JURY TRIAL CONTINUES.

Mar. 31, 1975. Order to compel testimony of Robert C Gimlin, and further directing no testimony shall be used against him (Teitelbaum, J).
Mar. 31, 1975. Order ent denying motion on behalf of deft Andrew Watt to strike portion of testimony of witness Rhyne Simpson Jr (Teitelbaum, J).
Apr. 1, 1975. TRANSCRIPT of jury trial of 3/31 (rep M Wike) (volume 17).
Apr. 1, 1975. JURY TRIAL continues before Teitelbaum, J (see sheet for oral motions).
Apr. 1, 1975. Motion for REDUCTION OF SENTENCE filed by Claude E Harper.
Apr. 1, 1975. Order ent vacating order of 3/31/75 (Teitelbaum, J) (re witness Simpson).
Apr. 2, 1975. TRANSCRIPT of jury trial on 4/1 (volume 18) (rep M Wike).
Apr. 2, 1975. JURY TRIAL continues before Teitelbaum, J (see sheet for oral motion).
Apr. 2, 1975. Order to compel testimony of K A McCaskill (Teitelbaum, J).
Apr. 3, 1975. TRANSCRIPT of jury trial of 4/2 (volume 19) (rep M Wike).
Apr. 3, 1975. JURY TRIAL CONTINUES (see sheet for oral motion).
Apr. 3, 1975. DEFTS' motion for order precluding govt from introducing documents not designated in govt's bills of particulars.
Apr. 4, 1975. TRANSCRIPT of jury trial on 4/3 (volume 20) (rep M Wike).
Apr. 7, 1975. JURY TRIAL CONTINUES.
Apr. 8, 1975. Transcript of proceedings of jury trial on 4/7/75 (Volume 21) (Rep. Wike).
Apr. 8, 1975. Hearing held on motion to preclude introducing docs not in bill particulars and Watt's motion strike testimony and taken CAV before Teitelbaum, J. (Memo filed) (Rep. M. Wike).
Apr. 8, 1975. Supplement of deft U. S. Gypsum Co. to defts motion for an order precluding the Gov from introducing into evidence docs not designated in the govs bills of particulars filed.

Apr. 8, 1975. JURY TRIAL CONTINUES.
Apr. 9, 1975. TRANSCRIPT of jury trial on 4/8 filed (Rep. M. Wike).
Apr. 9, 1975. JURY TRIAL CONTINUES before Teitelbaum, J.
Apr. 10, 1975. TRANSCRIPT of jury trial on 4/9 (rep M Wike).
Apr. 10, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J.
Apr. 11, 1975. Order of 4/10, amending sentence as to deft Harper extending period in which fine and costs may be paid to within 18 month period of supervised probation as a condition of probation (Teitelbaum, J) cc issued.
Apr. 11, 1975. TRANSCRIPT of jury trial on 4/10 filed (rep M Wike).
Apr. 14, 1975. Hearing on oral motions for mistrial, oral motion to quash subpoenas held 4/12 before Teitelbaum, J (rep M Wike).
Apr. 14, 1975. TRANSCRIPT of hearing held Sat, 4/12 before Teitelbaum, J (rep M Wike).
Apr. 14, 1975. JURY TRIAL CONTINUES.
Apr. 14, 1975. Hearing on oral motion to suppress testimony of Robt Fredericks held before Teitelbaum, J—(denied orally) (rep M Wike) (Memo filed.
Apr. 14, 1975. Order ent to compel testimony of Robert Fredericks (Teitelbaum, J).
Apr. 14, 1975. Order to compel testimony of Oliver Eugene Burch filed (Teitelbaum, J).
Apr. 15, 1975. TRANSCRIPT of jury trial 4/14 before Teitelbaum, J (volume 26 (rep M Wike.
Apr. 15, 1975. JURY TRIAL continues.
Apr. 15, 1975. Order to compel testimony of Arnold L E Meyer (Teitelbaum, J).
Apr. 16, 1975. TRANSCRIPT of jury trial on 4/15 (volume 27) (rep M Wike).
Apr. 16, 1975. Memorandum order ent denying deft Watt's motion to strike; denying defts' motion for mistrial; denying defts' motion to preclude evidence documents not designated in bill of particulars (Teitelbaum, J).
Apr. 16, 1975. JURY TRIAL CONTINUES.
Apr. 16, 1975. Order to compel testimony of Robert Sikes filed (Teitelbaum, J).
Apr. 17, 1975 JURY TRIAL CONTINUES.

Apr. 17, 1975. TRANSCRIPT OF JURY TRIAL on 4/16 (volume 28) rep. M Wike).
Apr. 18, 1975. TRANSCRIPT OF JURY TRIAL on 4/17 (rep M Wike) volume 29.
Apr. 21, 1975. JURY TRIAL CONTINUES (defts 1, 2, 3, 5, 8, 9, 10).
Apr. 22, 1975. JURY TRIAL CONTINUES before Teitelbaum, J.
Apr. 22, 1975. Order to compel testimony of Earl Kroth filed (Teitelbaum, J.
Apr. 22, 1975. TRANSCRIPT of jury trial on 4/21 (volume 30) (rep M Wike)
Apr. 22, 1975. Order to compel testimony of Charles D Webster filed (Teitelbaum, J).
Apr. 23, 1975. TRANSCRIPT of jury trial 4/23 (volume 31) rep M Wike.
Apr. 23, 1975. JURY TRIAL CONTINUES (see sheet for oral motion).
Apr. 23, 1975. Certification of trial judge regarding juror payment (Teitelbaum, J) (copy filed) (orig in jury files).
Apr. 24, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J (see attached sheet for oral motion).
Apr. 24, 1975. TRANSCRIPT OF JURY TRIAL on 4/23 (volume 32) filed (rep M Wike).
Apr. 25, 1975. TRANSCRIPT OF JURY TRIAL on 4/24 (volume 33) filed (rep M Wike).
Apr. 28, 1975. JURY TRIAL CONTINUES before Teitelbaum, J.
Apr. 29, 1975. TRANSCRIPT of jury trial on 4/28 (volume 34) (rep M. Wike).
Apr. 29, 1975. JURY TRIAL CONTINUES.
Apr. 29, 1975. Order to compel testimony of Wayne I Tamblyn ent (Teitelbaum, J).
Apr. 29, 1975. Order to compel testimony of Sanford B Kellogg ent (Teitelbaum, J).
Apr. 30, 1975. TRANSCRIPT OF JURY TRIAL on 4/29 (volume 35) (rep M Wike).
Apr. 30, 1975. JURY TRIAL CONTINUES.
Apr. 30, 1975. Order to compel testimony of John P. Otterson ent (Teitelbaum, J).
May 1, 1975. TRANSCRIPT OF JURY TRIAL on 4/30 (volume 36) (rep M Wike).
May 1, 1975. JURY TRIAL CONTINUES.

May 5, 1975. TRANSCRIPT OF JURY TRIAL on 5/1 (volume 37) (rep M Wike).
May 5, 1975. JURY TRIAL CONTINUES.
May 6, 1975. TRANSCRIPT of trial on 5/5 (volume 38) filed (rep M Wike).
May 6, 1975. Motion of deft Jay P. Nicely for judgmt of acquittal filed.
May 6, 1975. Motion of deft Colon Brown for judgmt of acquittal filed.
May 6, 1975. Motion of deft Celotex Corp for judgmt of acquittal filed.
May 7, 1975. Motion of Natl Gypsum Co for judgmt of acquittal filed.
May 7, 1975. Motion of Georgia Pacific Corp for judgmt of acquittal filed.
May 7, 1975. Motion of U S Gypsum Co for judgmt of acquittal filed.
May 7, 1975. Motion of defts' to strike certain evidence filed.
May 7, 1975. Defts' motion to dismiss indictment filed.
May 7, 1975. Hearing on all motions for judmt of acquittal, mot to strike, mot to dismiss begun—before Teitelbaum, J.
May 8, 1975. TRANSCRIPT OF HEARING—on 5/7 volume 39) (rep M Wike)
May 8, 1975. Hearing on motions continues before Teitelbaum, J and concludes—Memo filed (CAV) (rep M Wike).
May 9, 1975. Defts' response to alleged contacts contained in govt papers, etc filed.
May 9, 1975. TRANSCRIPT of hearing on 5/8 before Teitelbaum, J (volume 40) (rep M Wike).
May 12, 1975. Defts' joint motion for immediate explanatory jury instruction on price verification calls or, in the alternative, a mistrial filed.
May 12, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J (see attached sheet for oral motions).
May 13, 1975. TRANSCRIPT of jury trial on 5/12 (volume 41) (rep M Wike).
May 13, 1975. JURY TRIAL CONTINUES.
May 14, 1975. TRANSCRIPT OF JURY TRIAL OF MAY 13, 1975 (volume 42) (rep M Wike).
May 14, 1975. JURY TRIAL CONTINUES.

May 15, 1975. JURY TRIAL CONTINUES.
May 15, 1975. TRANSCRIPT OF JURY TRIAL of 5/14 (volume 43) (rep M Wike).
May 16, 1975. TRANSCRIPT OF JURY TRIAL on 5/15 (volume 44) (rep M Wike).
May 16, 1975. Affidavit of William A Montgomery filed.
May 19, 1975. JURY TRIAL CONTINUES.
May 20, 1975. TRANSCRIPT OF JURY TRIAL ON 5/19 (volume 45) (rep M Wike).
May 20, 1975. JURY TRIAL CONTINUES.
May 21, 1975. TRANSCRIPT OF JURY TRIAL on 5/20 (volume 46) (rep M Wike).
May 21, 1975. Motions of certain defts to quash govt subpoenae dated 5/20/75.
May 21, 1975. JURY TRIAL CONTINUES.
May 21, 1975. Hearing on motion to quash subpoenas held before Teitelbaum, J—(granted orally) Documents to be made available (Memo filed) (rep M Wike).
May 22, 1975. TRANSCRIPT of Jury trial on 5/21 (volume 47) (rep M Wike).
May 22, 1975. JURY TRIAL CONTINUES.
May 27, 1975. Hearing on motion to strike testimony held before Teitelbaum, J on 5/22—CAV Memo filed (rep. M Wike) (rulings in transcript of hearing).
May 27, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J. (see attached sheet re: motions).
May 27, 1975. TRANSCRIPT OF JURY TRIAL on 5/22 (volume 48) (rep M Wike).
May 28, 1975. JURY TRIAL CONTINUES.
May 28, 1975. TRANSCRIPT OF JURY TRIAL on 5/27 (volume 49) (rep M Wike).
May 29, 1975. TRANSCRIPT OF JURY TRIAL on 5/28 (volume 50) (rep M Wike).
May 29, 1975. JURY TRIAL CONTINUES.
May 30, 1975. TRANSCRIPT OF JURY TRIAL on 5/29 (volume 51) (rep M Wike).
May 30, 1975. JURY TRIAL CONTINUES.
June 2, 1975. TRANSCRIPT OF JURY TRIAL on 5/30 (volume 52) (rep M. Wike).
June 2, 1975. JURY TRIAL CONTINUES.

June 3, 1975. TRANSCRIPT OF JURY TRIAL on 6/2 (volume 53) (rep M. Wike).
June 3, 1975. JURY TRIAL CONTINUES.
June 3, 1975. Motion of Celotex Corp for order specifying jury instructions, with exh #A attached.
June 4, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J.
June 4, 1975. TRANSCRIPT of jury trial on 6/3 (volume 54) (rep M Wike).
June 5, 1975. JURY TRIAL CONTINUES.
June 5, 1975. TRANSCRIPT of jury trial on 6/4 (volume 55) (rep M Wike).
June 6, 1975. TRANSCRIPT of jury trial on 6–5 (volume 56) filed. (Rep. M. Wike).
June 10, 1975. JURY TRIAL CONTINUES.
June 11, 1975. TRANSCRIPT of jury trial on 6/10 (volume 57) (rep M Wike).
June 11, 1975. JURY TRIAL CONTINUES.
June 12, 1975. JURY TRIAL CONTINUES.
June 12, 1975. TRANSCRIPT of jury trial on 6/11 (volume 58) (rep M Wike).
June 13, 1975. TRANSCRIPT of jury trial on 6/12 (volume 59) (rep M Wike).
June 13, 1975. JURY TRIAL CONTINUES.
June 13, 1975. Order ent directing U S Gypsum produce tapes for inspection to U S, and govt personnel shall not be permitted to question USG's employees (Teitelbaum, J).
June 16, 1975. TRANSCRIPT of jury trial of 6/13 (volume 60) (rep M Wike).
June 16, 1975. JURY TRIAL CONTINUES.
June 17, 1975. TRANSCRIPT of jury trial on 6/16 (volume 61) (rep M Wike).
June 17, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J.
June 18, 1975. TRANSCRIPT OF JURY TRIAL ON 6/17 (volume 62) (rep M Wike).
June 18, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J.
June 19, 1975. TRANSCPIPT OF JURY TRIAL ON 6/18 (volume 63) (rep M Wike).
June 19, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J.
June 20, 1975. TRANSCRIPT of jury trial on 6/19 (volume 64) (rep M Wike).

June 24, 1975. TRANSCRIPT of jury trial on 6/24 (volume 65) (rep M Wike).
June 24, 1975. JURY TRIAL CONTINUES.
June 25, 1975. JURY TRIAL CONTINUES.
June 25, 1975. Motion of deft Georgia Pacific for judgmt of acquittal filed.
June 26, 1975. Motion of National Gypsum Co for judgmt of acquittal filed.
June 26, 1975. Motion of Andrew J. Watt for judgment of acquittal filed.
June 26, 1975. Motion of Celotex for judgmt of acquittal filed.
June 26, 1975. Motion of Defendants to Dismiss or Judgment of Acquittal filed.
June 26, 1975. Motion of deft U S Gypsum Co for judgmt of acquittal filed.
June 27, 1975. TRANSCRIPT of jury trial on 6/25 (volume 66) (rep M Wike)
June 27, 1975. Defts' motion to strike certain evidence filed.
June 27, 1975. Motion of deft Colon Brown for judgmt of acquittal filed.
June 27, 1975. Hearing on points for charge held before Teitelbaum, J—(motion to strike testimony orally denies defts and mot for judgmt of acquittal orally denied all defts) Memo filed (Rep M Wike).
June 27, 1975. Transcript of proceedings before Teitelbaum, J filed (volume 67) rep M Wike.
June 27, 1975. Defts' objections to manner of Court's rulings on requested final jury instructions and motion for clarification of court's rulings filed.
June 30, 1975. JURY TRIAL CONTINUES BEFORE TEITELBAUM, J.
July 1, 1975. TRANSCRIPT of proceedings of trial on 6/30 before Teitelbaum, J (rep M Wike) Vol 68.
July 1, 1975. JURY TRIAL CONTINUES.
July 1, 1975. Memorandum order entered stating that defts' motion for clarification of court's rulings on final jury instructions is rendered moot (Teitelbaum, J.).
July 2, 1975. TRANSCRIPT of Jury trial on 7/1 (volume 69) (rep M Wike).

July 2, 1975. JURY TRIAL CONTINUES.
July 2, 1975. Defts' request for final jury instructions filed (loose leaf binder).
July 2, 1975. Govt's request to charge filed.
July 2, 1975. National Gypsum Co's request for supplemental jury instruction filed.
July 2, 1975. Georgia PACIFIC Corp's request for supple final jury instructions filed.
July 2, 1975. Georgia Pacific Corp's request for addtl final jury instructions filed.
July 2, 1975. Objections to gov't request to charge filed.
July 2, 1975. Supple final instruction requested by deft Watt regarding verification and the Robinson Patman Act filed.
July 2, 1975. Supplemental requests to charge filed by defts.
July 2, 1975. Supplemental final instruction requestd by deft Watt regarding retroactivity of intervening change of law affecting verification filed (denied).
July 3, 1975. TRANSCRIPT of Jury Trial on 7/2 (volume 70) (rep M Wike).
July 3, 1975. JURY TRIAL CONTINUES.
July 7, 1975. TRANSCRIPT OF JURY TRIAL on 7/3 (volume 71) (rep M Wike).
July 7, 1975. JURY TRIAL CONTINUES.
July 7, 1975. Govt's suppplemental request to charge re defts' Robinson Patman Act Contentions.
July 8, 1975. TRANSCRIPT OF JURY TRIAL on 7/7 (vol 72) (rep M Wike)
July 8, 1975. Georgia Pacific Corp's supple requests as a result of rebuttal summation filed.
July 8, 1975. JURY TRIAL CONTINUES AND CONCLUDES before Teitelbaum, J—Memo filed (rep M Wike) (see attached sheet for oral motion).
July 9, 1975. TRANSCRIPT of jury trial on 7/8 (volume 73) (rep M Wike).
July 10, 1975. Order re Jury accommodations filed (Teitelbaum, J).
July 10, 1975. TRANSCRIPT OF jury trial on 7/9 (volume 74) (rep M Wike).
July 11, 1975. TRANSCRIPT of proceedings on 7/10 before Teitelbaum, J (rep M Wike).

July 11, 1975. Notice of service of letter to M Wike, reporter and attachment entitled "Corrections to trial transcript submitted by Celotex Corp filed.

July 13, 1975. Transcript of proceedings commencing July 11, 12, 1975 before Teitelbaum, J (rep Wike).

July 13, 1975. Transcript of proceedings July 13 (rep M Wike).

July 15, 1975. Jury return VERDICT of GUILTY as to UNITED STATES GYPSUM Co, Verd sheet filed.

July 15, 1975. Jury return VERDICT OF GUILTY AS TO NATIONAL GYPSUM Co, Verdict Sheet filed.

July 15, 1975. Jury return VERDICT OF GUILTY AS TO GEORGIA PACIFIC CORP, Verdict sheet filed.

July 15, 1975. Jury return VERDICT OF GUILTY as to CELOTEX CORP, Verdict sheet filed.

July 15, 1975. Jury return VERDICT OF GUILTY as to ANDREW J. WATT, Verdict sheet filed.

July 15, 1975. Jury return VERDICT OF GUILTY as to J. P. NICELY, Verdict sheet filed.

July 15, 1975. Jury return VERDICT OF GUILTY as to COLON BROWN, Verdict sheet filed.

July 15, 1975. Motion of deft Colon Brown for judgmt of acquittal after discharge of jury or for new trial filed.

July 15, 1975. Motion of deft Jay P Nicely for judgmt of acquittal or for new trial filed.

July 15, 1975. Oral motion of all defts for new trial or judmgt of acquittal filed and denied orally by the Court.

July 15, 1975. TRANSCRIPT of proceedings on 7/14 before Teitelbaum, J (rep M Wike).

July 15, 1975. Questions received by Judge during trial and jury deliberations which were submitted by jurors filed.

July 15, 1975. SENTENCE OF U S GYPSUM Co: Pay fine $50,000 and pay share of costs of prosec. Fine and costs to be paid in 30 days (Teitelbaum, J (rep M Wike.

July 15, 1975. cc issued.

July 15, 1975. Notice issued.

July 15, 1975. SENTENCE OF NATIONAL GYPSUM Co: Pay fine $50,000 and pay share of costs of prosecution. Pay fine and costs in 30 days (Teitelbaum, J (rep M Wike).

July 15, 1975. cc issued and notice issued.

July 15, 1975. SENTENCE OF GEORGIA PACIFIC CORP: Pay fine $50,000 and pay share of costs. Pay fine and costs in 30 days (Teitelbaum, J (rep M Wike).

July 15, 1975. cc issued and notice issued.

July 15, 1975. SENTENCE OF CELOTEX CORP: Pay fine $50,000 and pay share of costs of prosecution Pay fine and costs in 30 days (Teitelbaum, J (rep M. Wike.

July 15, 1975. cc issued and notice issued.

July 15, 1975. SENTENCE OF ANDREW J WATT: Impr 6 mos. Ex prs sent susp, placed on prob 1 yr Pay fine $10,000 and share of costs during probation. Special condition of prob being that deft obey all local, state and fed laws, comply with rules of prob office and that fine imposed be paid within term of probation and paid out of personal assets of deft and that he not accept reimbursement directly or indirectly from his employer (Teitelbaum, J (rep M Wike.

July 15, 1975. cc issued and notice mailed.

July 15, 1975. SENTENCE OF COLON BROWN: Impr 6 mos. Ex pr sent susp. placed on prob for 3 yrs and pay fine $50,000 and share of costs. Pay share of costs during probation. Special condition of probation is that deft obey all local, state and fed laws: Comply with rules and regulations of prob office; and that fine imposed be paid during term of probation and that it be paid out of personal assets of deft; and that he not accept reimbursement directly or indirectly from employer (Teitelbaum, J) (rep M Wike).

July 15, 1975. cc issued and notice issued.

July 15, 1975. SENTENCE OF J P NICELY: Impr 6 mos. Ex pr sent susp. placed on prob for 1 yr Pay fine $1000 and pay share of costs of prosecution. Special condition of prob is that deft obey all local, state, fed laws: comply with rules and regulations of prob office and pay fine out of personal assets and not accept reimbursement from employer (Teitelbaum, J) (rep M Wike).

July 15, 1975. cc issued and notice issued.

July 15, 1975. Conference held before Teitelbaum, J 7-15 Memo filed (rep M Wike) Orally, all sentenced are stayed pending appeal. Bonds contd pending appeal Briefs to be file re not for new trial and/or judmt of acquittal).

July 15, 1975. Transcript of proceedings 7/15 before Teitelbaum, J filed (rep M Wike).
July 22, 1975. Withdrawal of Written Motions of Deft Jay P. Nicely In Re: Judgment of Acquittal filed.
July 22, 1975. Withdrawal of Written Motion of Deft Colon Brown In re: Judgment of Acquittal filed.
July 22, 1975. Notice of Appeal filed by Deft Andrew J. Watt.
July 22, 1975. Copy of Notice together with docket entries & Crim Form mailed to U.S. court of Appeals. Copy of Notice given to Judge, Copy of Notice to Counsel, letters to Counsel mailed.
July 22, 1975. Statement of U.S. Gypsum Co. that it will not at this time file written post-trial motions for a new trial or judgment of acquittal, in view of the Court's oral denial, on July 15, of oral motion for new trial or judgment of acquittal & the Court's remarks as reflected in the transcript of the post-sentencing hearings on 7/17/75, filed.
July 22, 1975. Defts' motion for post trial interview or an in camera interrogation of Jurors and alternate jurors and for disclosure of impounded transcript and proposed order filed by defts. U. S. Gypsum Co., Andrew J. Watt, National Gypsum Co., Colon Brown, J. P. Nicely, Georgia-Pacific Corp. and The Celotex Corp.
July 23, 1975. Notice of appeal filed by defendant Georgia Pacific Corp.
July 23, 1975. Copy of notice of appeal to U.S. Ct. of Appeals with criminal form & docket entries; copy of notice to Judge; copy of notice to appelle; letters to all counsel.
July 23, 1975. Notice of Appeal filed by U.S. Gypsum Co.
July 23, 1975. Copy of Notice given to Judge. Notice with docket entries & Crim form mailed to U.S. Court of Appeals. Copy of notice to counsel and letters mailed.
July 24, 1975. Notice of appeal filed by National Gypsum Co.
July 24, 1975. Notice of appeal filed by Jay P. Nicely.
July 24, 1975. Notice of appeal filed by Colon Brown.
July 24, 1975. Copies of notices of appeals to U.S. Ct. of Appeals with docket entries & criminal form; copies of notices to Judge; copies of notices to appellee; letters to all counsel.
July 24, 1975. Notice of appeal filed by the Celotex Corp.
July 24, 1975. Copy of notice of appeal mailed U.S. Ct. of

Appeals with docket entries & Crim form copies to appellee; letters to all counsel.
July 28, 1975. Defts' motion to supplement their motion for post trial interview or an in camera interrogation of jurors and alternate jurors and disclosure of impounded transcript filed on 7-22-75 and proposed order filed.
July 28, 1975. Notice of delivering a letter regarding correction of official transcript filed by defts.
July 28, 1975. Order ent directing that reporter transcribe meeting between Court and George Russell, foreman of jury, on 7/14, and that same be transmitted, under seal, by Clerk to Thomas Quinn, Ct. of Appeals, and bear inscription "Impounded by order of Court, (Teitelbaum, J).
July 29, 1975. Order ent denying as moot defts' mot to supplement their mot for post trial interview or an in camera interrogation of jurors and alternate jurors and disclosure of impounded transcript filed 7/22 (Teitelbaum, J).
July 30, 1975. Letter from Clerk Quinn to B. Schaffler re transmitting record without the exhibits to the court of appeals.
July 31, 1975. Notice to counsel re Corrections to trial transcript with attachment attached.
Aug. 1, 1975. Notice from ct of appeals advising appeal of U S Gypsum docketed 75-1836; Natl Gypsum at 75-1837; Georgia Pacific at 75-1838; Celotex Corp at 75-1839; Colon Brown at 75-1840; Jay P Nicely at 75-1841; Andrew J Watt at 75-1842; with orders setting briefing schedule and copy of same to reporter M Wike.
Aug. 4, 1975. Original Record Mailed Ct of Appeals With Docket Entries.
Aug. 4, 1975. Letters to counsel with docket entries.
Aug. 8, 1975. Notice to counsel of letter mailed to rep M Wike with attachment regarding corrections of transcripts filed by Peter A Mullin, Atty, Dept of Justice.
Aug. 11, 1975. Receipt for original record rec:d from U.S. Ct. of Appeals.
Aug. 11, 1975. Notice of Objection in re: changes in transcript filed by Peter A. Mullin.
Aug. 12, 1975. Defts' withdrawal of the portion of defts' motion, dated 7-22-75, relating to disclosure of impounded transcript filed.

Aug. 14, 1975. Order entered dtd 8/12/75 re: changes in transcript of Courts charge to the jury on 7/8/75 (Teitelbaum, J).

Aug. 14, 1975. Memorandum opinion and order entered denying motions for judgment of acquittal or new trial by defts, U.S. Gypsum, National Gypsum, Georgia-Pacific, Celotex, Watt, Brown and Nicely (Teitelbaum, J.).

Aug. 14, 1975. Docs. 349, 350, 351, 352, 353 mailed as first supp.

Aug. 18, 1975. Transcript of in Camera conference held 7/14/75 filed (Sealed document.)

Aug. 18, 1975. Transcript marked doc. 354 and mailed as 2nd supp.

Aug. 22, 1975. Notice to all counsel of record filed by Peter A. Mullin Atty, Dept. of Justice stating that he, Mullin, mailed to M. Wike, Ct. reporter letter with an attachment regarding corrections to transcript (these are additional corrections).

Aug. 25, 1975. Receipt for 1st and 2nd supplement recd from ct of appeals.

Aug. 25, 1975. Notice, of letter to M. Wike, reporter regarding objections to gov't proposed corrections to transcript submitted 8/6, filed by Andrew J Watt.

Aug. 25, 1975. Notice, letter to M. Wike; reporter regarding corrections to transcript filed on behalf of Andrew J Watt.

Sept. 2, 1975. Requests for changes in transcript filed by Reporter M. Wike (in envelope).

Sept. 2, 1975. Documents, forwarded ct of appeals as 4th supplement (353, 356, 357, 358) (#355 was mailed on 8/22/75 as third supplement).

Sept. 4, 1975. Notice of service by mail to Peter Mullin, Dept Justice, letter regarding certain changes in transcript proposed by Govt in letter to M. Wike, dtd 8/6 filed by counsel for Andrew J Watt.

Sept. 4, 1975. Document 359 mailed as Fifth supplement to ct of appeals.

Sept. 8, 1975. Receipt for 3rd supplement recd from ct of appeals.

Sept. 8, 1975. Receipt for 4th supple recd from ct of appeals.

Sept. 15, 1975. Receipt for 5th supplemental recd from ct of appeals (#359 document).

Sept. 18, 1975. Certif copy order from ct of appeals denying appellant Celotex Corp's motion for post trial interview or an in camera interrogation of jurors; and order that appellants' joint motion to have subpoenaed documents involved in evidentiary hearing made available to appellants is referred to merits panel for disposition and granting appellants' motion for disclosure of impounded transcript of conversation between Dist Court and forman of jury on 7/14/75 (judge Garth would deny motion for disclosure of impounded transcript) (Circuit No's 75–1839/42 and 75–1839).

Oct. 10, 1975. Notice of objections by all defts to transcript of Marion Wike filed.

United States v. United States Gypsum Company et al.
(United States Gypsum Company, Appellant)

July 31, 1975. Copy of Notice of Appeal, rec'd. July 25, 1975, filed.

Aug. 5, 1975. Record filed. (Covers 75–1836/42). (over 74 vols. of transcripts filed—for list see sheet attached to record list). EXHIBITS TO BE RETAINED BY CLERK OF DC—UNTIL REQUESTED BY THIS COURT. See Clerk's letter of July 29, 1975.

Aug. 7, 1975. Joint motion by appellants to have the subpoenaed documents involved in the evidentiary hearing made available to appellants, filed. (4 cc.). Certificate of service attached. (Covers 75–1836/42).

Aug. 7, 1975. Joint motion by appellants for disclosure of impounded transcript of the conversation between the District Court and the foreman of the jury, which took place on July 14, 1975, filed. (4 cc.). Certificate of service attached. (Covers 75–1836/42).

Aug. 18, 1975. Response by appellee to appellants' joint motion to have the subpoenaed documents involved in the evidentiary hearing made available to appellants, filed. (4 cc.). Certificate of service attached. (Covers 75–1836/42).

Aug. 18, 1975. First Supplemental Record (Nos. 349/353), filed. (Cover 75–1836/42).

Aug. 19, 1975. Second Supplemental Record (No. 354-Transcript of In Camera conference held 7/14/75 filed in D.C. 8/18/75 [sealed document]), filed. IN U.S.C.A. SAFE. (Covers 75–1836/42).

Aug. 22, 1975. Exhibits Q1–Q44 rec'd for information of Court at its request from counsel. (Orig. set and 2 copies set). (Covers 75–1836/42).

Aug. 25, 1975. Third Supplemental Record (No. 355), filed. (Covers 75–1836/42).

Sept. 4, 1975. Fourth Supplemental Record (Nos. 356/358), filed. (Covers 75–1836/42).

Sept. 5, 1975. Fifth Supplemental Record (No. 359), filed. (Covers 75–1836/42).

Sept. 16, 1975. Order (*Seitz*, Ch.J., Gibbons and Garth, C.J.) re-referring appellants' joint motion to have the subpoenaed documents involved in the evidentiary hearing made available to appellants to the merits panel for disposition, since such panel will have the benefit not only of inspection but of briefing on those merits and can order supplemental briefing if it grants the motion; and granting appellants' joint motion for disclosure of impounded transcript of the conversation between the District Court and the foreman of the jury, which took place on July 14, 1975, filed (Judge Garth would deny the motion for disclosure of the impounded transcript, etc.) (Covers 75–1836/42.)

Nov. 25, 1975. Sixth Supplemental Record (Nos. 360/362), filed. (Covers 75–1836/42)

Jan. 16, 1976. Supplemental Brief of Appellant, U.S. Gypsum Company in No. 75–1836, filed. (25 ccs).

Jan. 16, 1976. Joint brief for appellants, filed. (1 cc.–25 corrected cc. rec'd January 20, 1976). (Covers 75–1836/42). (25 CORRECTED CC REC'D. 4/21/76). Service attached.

Mar. 4, 1976. Seventh Supplemental Record (No. 363), filed. (Covers 75–1836/42)

Apr 26, 1976. Brief for appellee, filed. Service by hand and mail on 4/26/76 attached. (Covers 75–1836/42)

May 10, 1976. Eighth Supplemental Record (Nos. 364/367), filed. (Covers 75–1836/42)

May 28, 1976. Joint reply brief by appellants, filed. (Covers 75–1836/42) (25 corrected cc rec'd 6/16/76).

May 28, 1976. Supplemental Reply brief by appellant, United States Gypsum Co., filed. Service by mail on 5/28/76 attached. (Covers 75–1836)

June 21, 1976. Argued. Coram: Adams, Hunter and Weis, C.J. (Covers 75–1836/42)

July 7, 1976. Transcript of oral argument on 6/21/76 before this Court, received at the direction of the Court, filed. (3cc) (Covers 75–1836/42)

Aug. 23, 1976. Letter dated August 20, 1976, together with corrections for the transcript of the tape recorded oral argument held on June 21, 1976, and advising that counsel for the government and counsel for all defendants agree to corrections, received from Alfred W. Cortese, Jr., counsel for appellant in 75–1837. (Covers 75–1836/42)

Jan. 6, 1977. Opinion of the Court (Adams, *Hunter* and Weis, C.J. together with separate concurring opinion by Judge Adams and separate dissenting opinion by Judge Weis, filed. (Covers 75–1836/42)

Jan. 6, 1977. Judgment reversing the judgments of the District Court filed July 15, 1975 and remanding the cause in accordance with the opinion of this Court, filed. (Covers 75–1836/42)

Jan. 19, 1977. Motion by appellee for leave to extend time to file petition for rehearing to February

Jan. 20, 1977. Order (Adams, *Hunter* and Weis, C.J.) amending the opinion filed January 6, 1977, filed. (Covers 75–1836/42)

Jan. 24, 1977. Order (*Hunter*, C.J.) granting motion by appellee for leave to extend time to file petition for rehearing to February 22, 1977, filed. (Covers 75–1836/42)

Jan. 31, 1977. Copy of letter dated January 28, 1977 to Honorable Daniel M. Friedman advising that the S.C. extended the time for filing petition for writ of certiorari to and including March 7, 1977, received from Clerk of S.C. (Covers 75–1836/42)

Jan. 31, 1977. Copy of letter dated January 28, 1977 to Paul C. Warnke, Esq., counsel for appellant in Nos. 75–1840/1, advising that the S.C. extended the time for filing petition for writ of certiorari to and including March 7, 1977, received from Clerk of S.C. (Covers 75–1836/42)

Feb. 22, 1977. Petition for rehearing and suggestion for rehearing en banc by appellee, filed. Service attached. (Covers 75–1836/42)

Mar. 10, 1977. Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Rosenn, *Hunter*, Weis and Garth, C.J.) denying appellee's petition for rehearing, filed. (Covers 75–1836/42)

Mar. 18, 1977. Certified judgment in lieu of formal mandate issued. (Covers 75–1836/42)

Mar. 31, 1977. Copy of letter dated March 29, 1977 to Honorable Wade McCree advising that the S.C. extended the time for filing the petition for writ of certiorari to and including May 9, 1977, received from Clerk of S.C. (Covers 75–1836/42)

May 13, 1977. Notice of filing on May 9, 1977 of petition for writ of certiorari, received from Clerk of S.C., filed. (S.C. No. 76–1560) (Covers 75–1836/42)

(National Gypsum Company, Appellant)

July 1, 1975. Copy of Notice of Appeal, rec'd. July 28, 1975, filed.

(Georgia-Pacific Corporation, Appellant)

July 31, 1975. Copy of Notice of Appeal, rec'd. July 25, 1975, filed.

Nov. 19, 1975. Letter dated November 17, 1975, received from William B. Mallin, Esquire, counsel for appellant, Georgia-Pacific Corporation, notifying the Court that appellant, Georgia-Pacific Corporation joins in the "Renewed Motion of the Celotex Corporation, Appellant [No. 75–1839], for Leave to Conduct Post Trial Interviews of Jurors, received. (5cc) (No. 75–1838 ONLY)

(The Celotex Corporation, Appellant)

July 31, 1975. Copy of Notice of Appeal, rec'd. July 28, 1975, filed.

Sept. 4, 1975. Motion by appellant, pursuant to Rule 27, F.R.A.P., for post trial interview or an *in camera* interrogation of jurors: *A.* to interview George Russell, jury foreman in the trial below, and other jurors; or, in the alternative; *B.* for an in camera hearing, to be held in the District Court before a different District Judge, for interrogation by counsel for appellant of Mr. Russell and the other jurors, separately and individually, such hearing to be limited as follows: (1) interrogation of Mr. Russell as to what was said in the conversation between District Judge Hubert I. Teitelbaum and Mr. Russell, which took place on July 14, 1975, and as to what was said thereafter in the jury room about that conversation, (2) interrogation of the other jurors as to what was said in the jury room about that conversation, (3) such other subjects as the presiding District Judge may deem proper; *C.* to interrogate Marion C. Wike, the court reporter, by deposition or at a hearing before a different District Judge, as to what was said in that

conversation, and to require her to produce her stenographic notes for inspection and copying and for use in connection with such interrogation, filed. (4 cc.). Certificate of service attached.

Sept. 12, 1975. Response by appellee in opposition to appellant's motion for post trial interview or an *in camera* interrogation of jurors, filed. (4 cc.). Certificate of service attached.

Sept. 16, 1975. Order (*Seitz*, Ch.J., Gibbons and Garth, C.J.) denying, without prejudice, appellant's motion (The Celotex Corporation) for post trial interview or an in camera interrogation of jurors, in light of the order entered this day granting disclosure of the conversation between the District Court and the foreman of the jury; directing that if such a motion is renewed it will be referred to the merits' panel at the appropriate time provided that the filing of such a motion will not interfere with the present briefing schedule, filed.

Sept. 16, 1975. Certified copy of above order to C. of D.C.

Oct. 23, 1975. Motion by appellant for reconsideration of this Court's order of September 16, 1975, denying appellant's motion for post trial interview of jurors, in which appellant requests "that the motion panel of this Court consider and decide this Motion for Reconsideration based on Celotex' 'Motion for Leave to Conduct Post Trial Interviews of Jurors,' *filed October 13, 1975*," filed. (5 cc.). Certificate of service attached.

Oct. 16, 1975. Motion by appellant for leave to conduct post trial interviews of jurors, *forwarded under date of October 13, 1975*, and filed October 16, 1975, sent to the Court at the request of appellant, and Memorandum in support of motion, filed. (4 cc.). Certificate of service attached.

Oct. 23, 1975. Response of appellee, United States of America, to appellant's motion for leave to conduct post trial interviews of jurors, filed. (4 cc.). Certificate of service attached.

Oct. 24, 1975. Letter-Joinder dated October 22, 1975 from Georgia-Pacific Corporation, appellant in No. 75–1838, in Motions filed by Celotex Corporation, appellant in No. 75–1839, (1) for leave to conduct post trial interviews of jurors and (2) for reconsideration of this Court's order of

September 16, 1975, filed. (4 cc.). Proof of service in letter. (Covers 75–1838/9).

Oct. 30, 1975. Letter dated October 28, 1975 from counsel for appellee, United States of America, stating does not propose to file a formal opposition to appellant's motion for reconsideration of this Court's order of September 16, 1975; however, if the motion for reconsideration is granted, request leave to file response on the merits to appellant's request for permission to interview the jurors within 14 days from date of granting motion for reconsideration. (5 cc.). Proof of service in letter.

Oct. 31, 1975. Order (*Seitz*, Ch.J., Gibbons and Garth, C.J.) denying appellant's motion for reconsideration of this Court's order of September 16, 1975, denying appellant's motion for post trial interview of jurors; and denying appellant's motion for leave to conduct post trial interviews of jurors, with leave to file jury interview motions for the consideration of the merits panel, provided that if such motions are to be filed, they should be filed sufficiently in advance of the date appellants' opening brief is due, viz., December 5, 1975, to allow for the government's response and the inclusion of this issue in such brief, filed.

Nov. 17, 1975. Renewed motion of the Celotex Corporation, appellant, for leave to conduct post trial interviews of jurors, filed. (7 cc.)

Jan. 13, 1976. Supplemental Brief of Appellant, Celotex Corp., in No. 75–1839, filed. (25 ccs.)

May 26, 1976. Supplemental Reply Brief for appellant, Celotex Corp., received May 28, 1976, filed. Service by mail on 5/27/76 attached. (Covers 75–1839)

(Colon Brown, Appellant)

July 31, 1975. Copy of Notice of Appeal, rec'd. July 28, 1975, filed.

Jan. 16, 1976. Brief for appellant, Colon Brown, received January 19, 1976, filed. (25cc)

May 28, 1976. Supplemental reply brief for appellant, Colon Brown, received June 2, 1976, filed. Service by mail on 5/28/76 attached. (Covers 75–1840)

(Jay P. Nicely, Appellant)

July 31, 1975. Copy of Notice of Appeal, rec'd. July 28, 1975, filed.

Jan. 16, 1976. Brief for appellant, J. P. Nicely, received January 19, 1976, filed. (25..)

May 28, 1976. Supplemental reply brief for appellant, J. P. Nicely, received June 2, 1976, filed. Service by mail on 5/28/76 attached. (Covers 75–1841)

(Andrew J. Watt, Appellant)

July 31, 1975. Copy of Notice of Appeal, rec'd. July 23, 1975, filed.

Jan. 16, 1976. Supplemental Brief for Appellant Andrew J. Watt in No. 75–1842, filed. (25 ccs).

May 28, 1976. Supplemental Reply Brief for appellant, Andrew J. Watt, filed. Service by mail on 5/28/76 attached. (Covers 75–1842)

INDICTMENT

The Grand Jury charges:

I

Definition

1. As used herein the term "gypsum board" means the gypsum board machine products manufactured and sold by the defendant corporations, including, but not limited to, wallboard, sheathing and lath.

II

The Defendants

2. The corporations named below are hereby indicted and made defendants herein. Each of said corporations is organized and exists under the laws of the state, and has its principal place of business in the city, indicated below:

Corporation	State of Incorporation	Principal Place of Business
United States Gypsum Company.	Delaware	Chicago, Illinois.
National Gypsum Company.	Delaware	Buffalo, New York.
Georgia-Pacific Corporation.	Georgia	Portland, Oregon.
Kaiser-Gypsum Company, Inc.	Washington	Oakland, California.
The Celotex Corporation.	Delaware	Tampa, Florida.
The Flintkote Company.	Massachusetts	White Plains, New York.

During all or part of the period of time covered by this indictment, and within five years preceding the return hereof, said defendants engaged in the business of manufacturing and selling gypsum board in various states of the United States.

3. The individuals named below are hereby indicted and made defendants herein. During all or part of the period of time

covered by this indictment, and within five years preceding the return hereof, each was associated with one of the defendant corporations in the capacity indicated below:

Individual	Capacity	Corporation
Graham J. Morgan	Chairman of the Board and Chief Executive Officer.	United States Gypsum Company.
Andrew J. Watt	Executive Vice President.	United States Gypsum Company.
Colen Brown	Chairman of the Board and Chief Executive Officer.	National Gypsum Company.
J. P. Nicely	Vice President, Sales.	National Gypsum Company.
William H. Hunt	President	Georgia-Pacific Corporation.
Claude E. Harper	President	Kaiser-Gypsum Company, Inc.
Robert A. Costa	Vice President and General Manager.	Kaiser-Gypsum Company, Inc.
William D. Herbert	President	The Celotex Corporation.
George J. Pecaro	Chairman of the Board.	The Flintkote Company.
James D. Moran	President and Chief Executive Officer.	The Flintkote Company.

III

Co-Conspirators

4. The Gypsum Association, a trade association of gypsum board manufacturers, has participated as a co-conspirator with the defendants in the offense charged herein and has performed acts and made statements in furtherance thereof. During all or part of the period of time covered by this indictment, all of the defendant corporations were members of the Gypsum Association and representatives of said defendant corporations attended Gypsum Association meetings.

5. Various other firms and individuals, not made defendants in this indictment, have participated as co-conspirators with

the defendants in the offense charged herein and have performed acts and made statements in furtherance thereof. Included among these co-conspirators are Johns-Manville Corporation and Fibreboard Corporation.

IV

Trade and Commerce

6. Gypsum board is a common building material which is most often used in the construction of walls and ceilings. It is manufactured in standard thicknesses, lengths and widths, and while the various kinds of gypsum board are sold under different trade names by different manufacturers, the composition and quality of different brands are essentially the same, and customers switch brands because of slight price differentials or other inducements, such as more favorable terms and conditions of sale, methods of packaging and handling and job price protection.

7. The manufacture of gypsum board involves mixing water, accelerators and fillers with calcined gypsum ore to form a gypsum plaster "slurry" which is sandwiched between surface layers of paper or other materials by machinery which also cuts the board to size. When the gypsum slurry dries, the gypsum in the core reverts to rock form, resulting in a rigid sheet of building material. There are different kinds of gypsum board, such as regular and fire-rated wallboard, lath, sheathing, formboard and backing board. The different kinds of board are produced by the addition of certain ingredients to the gypsum core, by the use of different surface materials or by altering the basic form of the board by means such as lamination or perforation.

8. There is a substantial and continuous movement of gypsum board in interstate commerce from plants where it is manufactured to customers in states other than those where the plants are located. In addition, substantial quantities of the ingredients used in the manufacture of gypsum board regularly move in interstate commerce from their source to states where gypsum board manufacturing plants are located. During all or part of the period of time covered by this indictment, the defendant corporations, along with Fibreboard Corporation and Johns-Manville Corporation have participated in this inter-

(d) agreed to maintain published prices and terms and conditions of sale of gypsum board;

(e) agreed to maintain job price protection lists and to discuss and exchange data set forth therein in order to insure the maintenance of published prices of gypsum board;

(f) agreed at meetings of the Gypsum Association, over the telephone and by mail to adopt uniform methods of packaging and handling gypsum board;

(g) agreed to adopt uniform methods of delivery of gypsum board;

(h) telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom;

(i) telephoned or otherwise contacted one another to ascertain alleged deviations from other uniform practices and policies concerning the sale of gypsum board, including, but not limited to, job price protection, boundaries of price zones, methods of delivery, point of delivery, and packaging and handling;

(j) agreed not to undercut gypsum board prices which were ascertained from one another as the actual selling or offering prices to purchasers of gypsum board;

(k) agreed not to give a greater cash discount or more generous terms of sale than those ascertained from one another as the discount or terms being granted to offered to purchasers of gypsum board;

(l) agreed not to deviate from standard, uniform practices and policies in the sale of gypsum board except to the extent deviations from such practices and policies were ascertained from one another; and

(m) engaged in predatory practices designed to eliminate or otherwise contain the competition generated from time to time by certain single-plant producers of gypsum board.

VI

Effects

13. The aforesaid combination and conspiracy has had the following effects, among others:

(a) prices of gypsum board sold by the defendant corporations and co-conspirators were raised, fixed, maintained and stabilized at non-competitive levels;

state movement of gypsum board and its ingredients. Within this period, these firms have sold and shipped substantial quantities of gypsum board to customers in states other than the states in which their plants are located and have obtained substantial quantities of ingredients for use in manufacturing gypsum board from states other than those where their plants were located.

9. During the period of time covered by this indictment, the defendant corporations, along with Fibreboard Corporation and Johns-Manville Corporation had total sales of more than $4 billion and accounted for more than 90 percent of the total sales of gypsum board in the United States.

V

Offense Charged

10. Beginning sometime prior to 1960 and continuing thereafter at least until sometime in 1973, the exact dates to the grand jurors being unknown, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in the manufacture and sale of gypsum board, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. § 1), commonly known as the Sherman Act.

11. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators to (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board.

12. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including among other things, the following:

(a) agreed to increase the prices of gypsum board;

(b) agreed to the terms and conditions of sale of gypsum board;

(c) published price lists and terms and conditions of sale in accordance with agreements reached;

(b) terms and conditions of sale of gypsum board offered by the defendants and co-conspirators were fixed, maintained and stabilized at non-competitive levels.

(c) competition was eliminated in the packaging, handling and delivery methods of gypsum board sold by the defendants and co-conspirators; and

(d) customers of the defendant corporations and co-conspirators have been deprived of free and open competition in the sale of gypsum board.

VII

JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy was carried out in part within the Western District of Pennsylvania and within the jurisdiction of this Court, within five years next preceding the return of this indictment.

Dated:

A TRUE BILL.

Foreman

(s) THOMAS E. KAUPER
Thomas E. Kauper
Assistant Attorney General.

(s) BADDIA J. RASHID
Baddia J. Rashid

(s) RICHARD J. FAVRETTO
Richard J. Favretto

(s) JOHN C. FRICANO
John C. Fricano

(s) RODNEY O. THORSON
Rodney O. Thorson

(s) L. JOHN SCHMOLL
L. John Schmoll
Attorneys, Department of Justice.

RICHARD L. THORNBURGH
United States Attorney.

BILL OF PARTICULARS

[p. 30, l.24–p. 31, l.4]

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In furtherance of their scheme to raise, fix, maintain and stabilize the price of wallboard, the defendants instituted identical increases in the published price of wallboard on or about May 1, 1966; February 20, 1967; October 1, 1967; September 16, 1968; May 1, 1969; September 1, 1969; January 4, 1971; April 1, 1971; and June 14, 1971. Price changes after June 14, 1971 were also conspiratorially achieved and maintained. These price increases were instituted and maintained by the defendants through their continuing illegal agreement to exchange and discuss reported deviations from uniform published prices, terms and conditions of sale.

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[p. 197–p. 198]

PARTICULARS RE PARAGRAPH 12(h)–12(l)

Throughout the conspiratorial period charged in the indictment, the defendants were engaged in an illegal course of conduct which involved on a continuing basis the exchange and discussion among themselves of prices, terms and other competitive information. This mutually agreed upon illegal course of conduct of exchanging and discussing competitive information was for the purpose of raising, fixing, maintaining and stabilizing prices of gypsum board and increasing profits. This scheme assisted defendants in making uniform pricing decisions, which enabled them to maintain existing price levels and to avoid precipitating price declines on gypsum board products. It was also a means to achieve and maintain price increases and to increase profits. In addition, it served as a policing activity to ascertain whether the conspirators were adhering to the uni-

form prices and terms and conditions of sale established pursuant to the illegal agreements set forth in paragraph 12(a)–12(g) of the indictment and particularized herein.

Each communication between the conspirators relating to their agreement to exchange and discuss prices, terms and other competitive information was an overt act in furtherance of the conspiracy charged in the indictment, and each action taken as a result of such communication was also an overt act in furtherance of said conspiracy. Additionally, each act of concealment of the conspiracy was an overt act in furtherance of said conspiracy.

The genesis of the agreement to exchange and discuss prices, terms and other competitive information for the purpose of market stabilization may extend as far back as the 1940's. Illegal conspiratorial communications occurred with varying intensity depending upon the competitive state of the market. The frequency of exchanges and discussions was the greatest during periods of heightened competitive activity. An investigation in 1966 by Crowell, G–P's house counsel, uncovered the fact that G–P's pricing officials were in telephonic contact with their co-conspirators daily on pricing and other competitive matters.

The conspirators also exchanged and discussed competitive information such as prices and terms at meetings. (See Appendix A hereto) These occurred at rump sessions after Gypsum Association meetings; at gatherings of other trade associations of which the defendants were members; and at the time of meetings concerning buy/sell arrangements between the defendants. (See Appendix A)

In furtherance of the conspiratorial scheme, the defendants exchanged price lists and exchanged and discussed announcement and effective dates of price changes, terms and conditions of sale and other competitive information in order to achieve and maintain agreements concerning such changes as more fully particularized under paragraph 12(a)–(e) *supra*.

Additionally, as part of their continuing agreement to exchange and discuss competitive information, the defendants provided one another with advance notice of all published price changes prior to the time of their public announcement. Thus,

in a meeting on or about February 19, 1965, Gimlin and Lane of USG gave Seitz of Flintkote advance notice of a price change by USG effective on or about March 1, 1965, prior to its public announcement. See also particularization of paragraph 12(a)–(e) *supra*.

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[p. 200 lines 1–4]

At the first Gypsum Association meeting he attended in October 1964, Simpson of Republic was approached by John Brown of National and invited to participate in the conspiracy.

MEMORANDUM ORDER OF JANUARY 16, 1975

There is presently before the Court a motion to take the preferred nolo contendere pleas in this case *in camera* and to impound until the conclusion of the jury trial the results of the proceedings on such pleas. For the reasons contained in this Opinion, I will deny defendants' motion.

To my mind, the American system of conducting all court proceedings in public is the greatest protection of the benefits of democracy that we have had to work with since the founding of this Republic. It is my belief that to proceed otherwise would be to open our judicial and governmental system to the potential of the most terrible abuses. To conduct this or any other proceeding in secret would be to step, however hesitantly, down the path toward corruption and to step inevitably backwards towards the abhorrent procedures of the Star Chamber. Thus, it follows that the traditional policy of conducting all judicial proceedings in the open should only be modified for the most compelling reasons.

Defendants' cite to the Court the case of *United States* v. *Toner*, 173 F. 2d 140 (3rd Cir. 1949), for the proposition that the very possibility of transmittal to the jury through the media of the knowledge that one or more co-conspirators in a criminal conspiracy case have pleaded other than not guilty is inevitably and inescapably prejudicial to those defendants who choose to stand trial. The *Toner* case simply does not stand for such a proposition. *Toner* held that the guilty plea of one co-conspirator cannot be entered into evidence against other co-conspirators. This is inarguably true, just as it is true that the acquittal of a co-conspirator could not be so entered in evidence; nevertheless, it does not follow that one of the fundamental liberties of a free democracy should be in any way jeopardized in order to exorcise the spector of possible prejudice in a case such as this. By the same token, the other cases cited by defendants, *United States, ex rel. Doggett* v. *Yeager*, 472

F. 2d 229 (3rd Cir. 1973) and *Marshall* v. *United States*, 360 U. S. 310 (1959), also fail to raise any consideration which rises to the level of the protection of a free press and the fundamental liberties of American democracy.

The very fact that from the beginning of this Republic the press has been able to observe and print its reports of all judicial and other governmental proceedings has been a primary factor in maintaining the operation of our Federal Courts at the high level we have traditionally enjoyed. This fact, is, in addition, the very cornerstone of the confidence in the jury system which is, in turn, the cornerstone of American trial practice.

It is my feeling that, especially in a case such as this where serious allegations of price fixing by major corporations and corporate officers are involved, the public has a right to know everything that goes on in such a trial. Whatever potential prejudice exists as a result of the publicity attendant to these proceedings can and will be remedied by the individual voir dire which we will follow in this case. It is not a matter of attempting to wipe from the jurors' minds information which it is impossible to eradicate; it is my expectation rather that the information which is disseminated as a result of these proceedings will have little or no effect on those members of the array who come before us as potential jurors. For these reasons the motion will be denied.

IT IS SO ORDERED.

(s) HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States District Judge.

January 16, 1975.

District Court Order (4/15/75)

MEMORANDUM ORDER OF APRIL 15, 1975

There are presently before the court, three motions for disposition. The first of these is a motion on behalf of defendant Andrew Watt to strike from the record testimony of witness Rhyme Simpson, Jr. that defendant Watt told him, in October 1964 at the first Gypsum Association meeting he (Simpson) attended, that he would be asked questions and should answer truthfully. Defendant Watt's objection is on the basis that no reference was made to this in the Bill of Particulars and that, instead, it was indicated that any such conversation occurred between Mr. Simpson and a Mr. John Brown. Defendant Watt contends that this variance amounts to prejudicial surprise.

The prosecution referred to a Watt-Simpson conversation in its offer of proof. There was no objection by defense. Again, there was no objection to the testimony concerning the conversation and defense counsel for Mr. Watt cross examined Mr. Simpson on the matter. Obviously, the defense wanted the tactical advantages of having Mr. Simpson change his testimony. Only after this was unsuccessful did counsel move to strike. Having chosen to "roll the dice," so to speak, defense cannot later complain as to the result. Defense was not surprised, considering the offer of proof, the Grand Jury testimony he had and the nature of his argument for not objecting sooner—that he hoped to correct Mr. Simpson's testimony on cross-examination.

In considering this question I have paid particular heed to the case of *United States* v. *Neff*, 212 F. 2d 297 (3d Cir. 1954). The Appeals Court's reference in that case to the possibility of curing the disparity between the Bill of Particulars and the evidence presented by means of a continuance in which defense counsel might study the new evidence seems to me to belie the implication urged by counsel that the Court in the same opinion means absolutely limited, without the possibility of exception, when it stated that "the bill of particulars strictly

limits the prosecution to proof within the area of the bill." *Id.* at 309.

I do not believe that a bill of particulars must be given the inflexible effect contended for by the defense. A variance, as can reasonably be implied here, must then be examined to determine whether the defendant was so adversely affected as to require the surgical remedy requested. Instead, I believe that the important safeguard against surprise should be applied so as to be fair to both sides, while not overlooking that a trial is a search for the truth, not a game of chess with arbitrary rules applied mechanically.

Under the circumstances here involved, I do not believe that defendant Watt was so prejudiced by surprise testimony as to require that it be stricken. The prejudice contended is that Mr. Watt's counsel could have interviewed Simpson prior to trial if he had been alerted to the alleged conversation by the Bill of Particulars and, possibly obtained a statement useful for impeachment. It is noted, however, that Mr. Simpson's counsel had informed other defense counsel that he would not talk to them. Also, Simpson's Grand Jury testimony was available and used for this purpose.

Upon consideration of all the circumstances here involved defendant Watt's motion to strike is denied.

The second motion before the Court is defendants' joint motion for mistrial for alleged prosecutorial misconduct. This motion was initially occasioned by defense counsel Mellott's contention that the prosecutor, Mr. Fricano, had unfairly prejudiced the situation against the defendants by stating that a witness' lawyer "didn't know what he was talking about." (Transcript of April 3, 1975, p. 3883). This specific contention is shown by the record to be unfounded. Mr. Fricano actually stated that the lawyer "didn't know what was going on." (Transcript p. 3882).

The motion was thereafter broadened in scope to allow defense counsel to argue as to all instances of alleged prosecutorial conduct they contended had occurred. Defendants submitted a twenty-five (25) page brief in support of their motion and the motion itself was argued by counsel for both sides on Saturday, April 12, 1975.

I have thoroughly considered each and every instance of supposed misconduct raised in the brief and in argument by counsel and find no instances individually or cumulatively

sufficient to warrant the granting of defendants' motion. As all counsel are well aware, trial practice is not an antiseptic, intellectual exercise conducted with the rigid formality of a minuet. Occasionally, even the most restrained of trial lawyers will venture near the boundaries of propriety in pursuing his advocate's function. I have considered the alleged instances of misconduct contended to exist here [1] and arrive at the conclusion, the prosecution has not ventured beyond those outposts of discretionary latitude which every trial judge must allow.

Beyond noting that inevitable semantic dispute cannot be labelled prosecutorial misconduct, it seems to me that the most important consideration in this regard is the fact that defendants' motion centers on the government's examination of witnesses (particularly Mr. Bear, Mr. Gimlin and Mr. McCaskill) who cannot be said to be neutral, in the classic legal sense of that word. Though called as government witnesses, these men are employees or former employees of the defendant companies. Their testimony has been at best reluctant, at worst, adverse. In such a context, particularly where I have time and again cautioned the jury that questions are not evidence, only answers are, I can find no reason to grant defendants' motion for mistrial. It is denied.

The third motion before the Court is defendants' motion to preclude from evidence documents not specifically designated in the Bill of Particulars. The government is not required to itemize specific evidence or exhibits in its Bill. Defendants' motion is denied.

IT IS SO ORDERED this 15th day of April, 1975.

(s) HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States District Judge.

[1] Defendants group their contended instances of prosecutorial misconduct into five categories: (1) suggesting evidence not in the record; (2) misstating the record; (3) arguing with the witness; (4) expressing personal belief; and (5) making prejudicial remarks.

DEFENDANTS' MOTION FOR POST TRIAL INTERVIEW OR AN IN CAMERA INTERROGATION OF JURORS AND ALTERNATE JURORS AND FOR DISCLOSURE OF IMPOUNDED TRANSCRIPT

The undersigned defendants (moving separately but on a joint paper for the convenience of the Court) move the Court to permit defendants or their representatives to interview the jurors and alternate jurors in such manner as defendants deem proper, or, in the alternative, to hold an *in camera* hearing for interrogation of said jurors and alternate jurors separately and individually with full participation of all parties, such hearing to be limited, in accordance with Rule 606(b) of the Federal Rules of Evidence, to the subjects of premature deliberations and determinations by the jury and of extraneous prejudicial publicity brought to the jury's attention. In support of their motion, defendants set forth the following grounds:

1. On July 2, 1975, before the completion of closing arguments and the charge by the Court, an alternate juror, Jean M. Rohm, made a statement to Andrew J. Watt, one of the individual defendants, and his wife, which statement provides good cause for believing that the jury, or at least some jurors, had engaged in premature deliberations and determinations. In further support of this motion, the affidavits of Andrew J. Watt and Thelma Watt are attached hereto and made a part of this motion. Mrs. Rohm was discharged by the Court at a hearing held outside the presence of counsel for six of the seven defendants and without notice to said defendants or their counsel;

2. Both preceding and during the trial there was extensive prejudicial publicity related to the pleas of nolo contendere entered by certain original defendants prior to the trial and to the sentences imposed by the Court in connection with those pleas (see Court Exhibit # 1) which in all probability came to the attention of the jury;

3. Both preceding and during the trial there was extensive prejudicial publicity related to the West Coast litigation and the settlement thereof (see Court Exhibit #1) which in all

probability came to the attention of the jury and which litigation was referred to and made the subject of inquiries during the trial by the prosecution;

4. The Court has enjoined defendants from talking to the jurors and alternate jurors.

Defendants further move the Court for disclosure of the impounded transcript of the conversation between the Court and George Russell, foreman of the jury, which took place on July 14, 1975. In addition, defendants move that all notes made by the court reporter of that conversation be filed of record in this case. In support of this motion, defendants set forth the following grounds:

1. On July 14, 1975, the jury foreman requested to meet with the Court to discuss the condition of the jury and further guidance. The Court met with the foreman in the presence of the court reporter but outside the presence of defense counsel;

2. The Court impounded the transcript of that meeting and refused to make it available to defense counsel despite repeated requests;

3. Since the trial has been completed, and the jury has submitted its verdict, no valid reason exists for impoundment of said transcript.

If the Court refuses to permit defendants or their representatives to interview the jury foreman in such manner as defendants deem proper, then defendants move the Court to hold an *in camera* hearing after the impounded transcript is made available to defense counsel for interrogation of the jury foreman with full participation of all parties with respect to all proper subjects.

These motions are made in aid of defendants' appeals or possible motions for new trial based on the ground of newly discovered evidence.

Respectfully submitted,

(s) ROBERT C. KECK,
Robert C. Keck,
JAMES G. HIERING,
VALENTINE A. WEBER, JR.,
DOUGLASS F. ROHRMAN,
Price, Cushman, Keck, Mahin & Cate,
8300 Sears Tower, 233 South Wacker Drive,
Chicago, Illinois 60606,
Counsel for United States Gypsum Co.

(s) FRED H. BARTLIT, JR.,
Fred H. Bartlit, Jr.,
THOMAS A. GOTTSCHALK,
Kirkland & Ellis,
200 E. Randolph Drive,
Chicago, Illinois 60601,
Counsel for Andrew J. Watt.

(s) H. FRANCIS DELONE,
H. Francis DeLone,
ALFRED W. CORTESE, JR.,
JOHN F. WILSON, III,
Dechert, Price & Rhoads,
1600 Three [illegible] Center,
Philadelphia, Pennsylvania 19102,
Counsel for National Gypsum Company.

(s) PAUL C. WARNKE,
Paul C. Warnke,
THOMAS RICHARD SPRADLIN,
Clifford, Warnke, Glass,
McIlwain & Finney,
815 Connecticut Avenue, N.W.,
Washington, D.C. 20006,
Counsel for Messrs. Colon Brown and J. P. Nicely.

(s) CLOYD R. MELLOTT,
Cloyd R. Mellott,
(s) WILLIAM B. MALLIN,
William B. Mallin,
BARTON Z. COWAN,
J. GARY KOSINSKI,
Eckert, Seamans, Cherin & Mellott,
Forty-Second Floor, 600 Grant Street,
Pittsburgh, Pennsylvania 15219,
Counsel for Georgia-Pacific Corporation.

(s) W. DONALD MCSWEENEY,
W. Donald McSweeney,
WILLIAM B. MONTGOMERY,
Schiff, Hardin & Waite,
7200 Sears Tower, 233 South Wacker Drive,
Chicago, Illinois 60606,
Counsel for The Celotex Corporation.

Dated: July 22, 1975.

AFFIDAVIT OF ANDREW J. WATT

COMMONWEALTH OF PENNSYLVANIA }
County of Allegheny } *ss.:*

Andrew J. Watt on oath deposes and says:

1. That he is a defendant in the case entitled *United States* v. *United States Gypsum Company*, Criminal No. 73–347, tried in the Western District of Pennsylvania.

2. That on July 2, 1975, during a recess of the trial of the above-entitled cause, he and his wife entered an elevator at the Federal Courthouse in Pittsburgh, Pennsylvania.

3. That after he and his wife entered the aforesaid elevator, Mrs. Rohm, an alternate juror in the above-entitled cause, was already on the elevator, whereupon the following conversation took place:

a. He and his wife said "hello."

b. Mrs. Rohm put her finger to her lips and said: "Get me on that jury"—"It's one against eleven"—"Get me on that jury."

c. Mrs. Watt said: "I guess it would be nice to be on the jury."

At this point the elevator door opened and Mrs. Rohm left the elevator and hurried down the corridor.

(s) ANDREW J. WATT,
Andrew J. Watt.

Sworn and subscribed before me, a Notary Public, this 18th day of July, 1975.

(s) MARY EVELYN BUECHEL,
Notary Public.

Mary Evelyn Buechel, Notary Public, Pittsburgh, Allegheny County. My Commission Expires Dec. 30, 1976. Member, Pennsylvania Association of Notaries.

AFFIDAVIT OF THELMA WATT

COMMONWEALTH OF PENNSYLVANIA }
County of Allegheny } *ss.:*

Thelma Watt on oath deposes and says:

1. That she is the wife of Andrew J. Watt, a defendant in the case entitled *United States* v. *United States Gypsum Company*, Criminal No. 73–347, tried in the Western District of Pennsylvania.

2. That on July 2, 1975, during a recess of the trial of the above-entitled cause, she and her husband entered an elevator at the Federal Courthouse in Pittsburgh, Pennsylvania.

3. That after she and her husband entered the aforesaid elevator, Mrs. Rohm, an alternate juror in the above-entitled cause, was already on the elevator, whereupon the following conversation took place:

a. She and her husband said "hello".

b. Mrs. Rohm put her finger to her lips and said: "Get me on that jury"—"It's one against eleven"—"Get me on that jury".

c. Affiant said: "I guess it would be nice to be on the jury."

At this point the elevator door opened and Mrs. Rohm left the elevator and hurried down the corridor.

(s) THELMA WATT,
Thelma Watt,

Sworn and subscribed before me, a Notary Public, this 18th day of July, 1975.

(s) MARY EVELYN BUECHEL,
Notary Public.

Mary Evelyn Buechel, Notary Public, Pittsburgh Allegheny County. My Commission Expires Dec. 30, 1976. Member, Pennsylvania Association of Notaries.

ORDER OF COURT

This matter having come before the Court upon the Motion of the above defendants, and it appearing to the Court that said Motion should be granted, it is, this day of July, 1975, ORDERED:

1. that the defendants and/or their representatives are permitted to interview the jurors and alternate jurors in such manner as defendants deem proper;

2. that the transcript of the meeting between the Court and George Russell on July 14, 1975, is no longer impounded and copies of said transcript shall be provided to counsel for defendants; and

3. that all notes made by the court reporter of said conservation between the court and George Russell be filed of record in this case and that copies of said notes shall be provided to counsel for defendants.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Defendants' Motion for Post Trial Interview or an *In Camera* Interrogation of Jurors and Alternate Jurors and for Disclosure of Impounded Transcripts and proposed Order of Court by mailing, postage prepaid, a true and correct copy of Defendants' Motion for Post Trial Interview or an *In Camera* Interrogation of Jurors and Alternate Jurors and for disclosure of Impounded Transcripts and proposed Order of Court to John C. Fricano, Esquire, Antitrust Division, U. S. Department of Justice, 10th and Constitution Avenues, N. W., Washington, D.C. 20530, and also by hand delivering a true and correct copy to Blair Griffith, U. S. Attorney, Pittsburgh liaison counsel, U. S. Post Office and Courthouse, Pittsburgh, Pennsylvania 15219, on Tuesday, July 22, 1975.

(s) PETER C. BAGGEMAN.

District Court Opinion (8/14/75)

MEMORANDUM OPINION OF AUGUST 14, 1975

Immediately following the return of the verdict of guilty as to all defendants in this case on July 15, 1975, written motions for judgment of acquittal or new trial were filed by counsel for defendants Colon Brown and J. P. Nicely. Similar oral motions were made at that time on behalf of all defendants (Tr. 15,193–95). In conference with all counsel subsequently, I indicated that I was not inclined to grant such motions but that I would give due consideration to them (Tr. 15,228). I ordered that briefs in support thereof be due in two weeks.[1]

On July 22, counsel for Brown and Nicely withdrew their written motions and the first of the notices of appeal was filed. Eventually, all defendants filed such notices. On that same day, defense counsel filed the motion for post-trial interview or *in camera* interrogation of jurors and for disclosure of impounded transcript which is the subject of this opinion.

Although it is the general rule that the filing of a timely notice of appeal has the effect of immediately transferring jurisdiction to the Court of Appeals, a specific exception exists as to matters in aid of appeal. J. MOORE, FEDERAL PRACTICE, § 203.11 (2d ed. 1973) as stated in *dictum* in *Philadelphia Ma-*

[1] It might be considered that it was unwise to indicate my feelings as to post trial motions. I had no intention and did not orally deny the motions made as is clearly indicated by my stating that if the parties persisted in the motions I would consider them after receipt of briefs as scheduled. At least one defense counsel so treated the motion since he withdrew his written motions. I could have carefully weighed my words so as to have obscured my intentions or not revealed them at all. However, in view of the length of the trial and the time that would be required to dispose of post-trial motions, it seemed to me to be a more courageous approach to indicate my inclination and to allow the defendants to decide for themselves whether to go forward with motions at my level or to proceed at once to the Court of Appeals.

I recognize that when trial courts express themselves freely upon the record they may subject themselves to greater risk of reversal or remand. However, I believe that a proper understanding of the respective roles of trial and appellate courts indicates that the ends of justice are best served when the trial court performs its task openly, even at the risk of exposing error. *U. S. v. Derrick*, C. A. 6, 6/13/75, 17 Cr. L. 2306.

rine Trade Ass'n. v. Int'l. Longshoremen's Ass'n., 365 F. 2d 293 (3d Cir. 1966), *rev'd. on other grounds*, 389 U. S. 64, it is impractical to base restrictions on the power of the district Court on the technical consideration that judgment "passes" with the filing of the notice of appeal. Therefore, in the hope that the recounting of the events which preceded the filing of the instant motion will be of assistance to the Court of Appeals, I set forth the following background and rulings:

The jury and all parties had been informed previous to the morning of July 3, 1975 of my intention to continue with closings until that afternoon and then recess until Monday, July 7, 1975. On that Thursday morning, Fred Bartlit, attorney for defendant Andrew J. Watt, met with me in chambers at his request, in the presence of the government prosecutor, John Fricano. Attorney Bartlit informed me that his client had told him the previous evening, after court was adjourned, that the first alternate juror, a Mrs. Jean Rohm, had attempted to speak with him and his wife after the close of business that Wednesday. Mr. Watt's account of the incident as reported by Mr. Bartlit, was as follows: Mrs. Rohm joined defendant Watt and his wife on an otherwise unoccupied elevator. She gestured to the couple and said in a low voice: "Get me on this jury." Mr. Watt said nothing, apparently stunned at the obvious breach of the Court's instructions that there was to be no communication whatsoever between jurors and the parties or their lawyers. Mrs. Watt, apparently no less astonished, replied in a hesitant, but clearly noncommital way, that she understood that Mrs. Rohm had been listening to testimony a long time. Mrs. Rohm came closer and repeated: "Get me on this jury." She added: "It's eleven to one."

Attorney Fred Bartlit, as was his professional duty, informed me of his client's account of the incident as soon as he was able, the morning of July 3, 1975. He stated that he had not advised other defense counsel prior to informing the Court on instruction from his client. Mrs. Rohm was summoned from the jury room and the following colloquy took place:

> THE COURT: Mrs. Rohm, it has been brought to my attention—Mr. Bartlit thought it his duty to bring to my attention—as an officer of this court, he has got a duty to the court, and he told me of the occurrence between you and Mr. Watt on an elevator. I am told that you said

to Mr. Watt: "It is eleven to one. Get me on this jury."

Mrs. ROHM: I said "I would sure like to get on this jury; I have been here so long." That is what I said.

The COURT: You know you seriously violated the oath that you took. I am going to excuse you from this jury now. I am going to ask you to wait here until the jury is back in the jury box, and then, I am going to ask you to get your coat and your things and go home.

I am instructing you that you may not discuss or talk about anything to any member of this jury, about anything whatsoever, until this case is over and the jury has returned its verdict. If you do, you will be seriously violating the law. I know you have friends on the jury. I don't want you to call one of them.

Mrs. ROHM: I don't even have their numbers.

All counsel were then advised by the Court as to what had occurred. No counsel objected then or at any subsequent time to either the dismissal or the procedure followed until this post-trial motion was filed with, strangely, Mr. Bartlit's associate as the first movant.[2]

Upon returning into open court, the jury was told that Mrs. Rohm had been dismissed, without, of course, being informed of the reason (Tr. 14,389). The day's proceedings continued without incident. At the close of the day, in view of the upcoming three-day weekend, I once again cautioned the jury to discuss the case with no one, not even among themselves, and to keep their minds open until they had heard the final closings and my charge (Tr. 14,495–498).

A number of observations should be made about this incident:

(1) There is no indication that any communication of any type took place thereafter between Mrs. Rohm and any juror or any other person;

(2) Mrs. Rhom implicitly denied that she had said "It's eleven to one" by stating that she had only said: "I would sure like to get on this jury."

(3) Even if it is assumed that Mrs. Rohm did say "It's eleven to one," there is no indication that such a statement

[2] Certainly no one was harmed by the excuse of Mrs. Rohm since she was an alternate juror and would not have taken part in the jury deliberations as all of the original twelve jurors were able to serve to verdict.

evidenced anything more than her impression of the jury's inclinations. There is nothing to indicate that actual deliberations had begun prematurely or that a formal or informal vote of any sort had been taken.

(4) Again assuming Mrs. Rohm did say "It's eleven to one," there is nothing to indicate in whose favor such a hypothetical tally stood. The logical inference to be drawn from the fact that she told a defendant, as opposed to a representative of the prosecution, is that the jury leaned toward conviction, but beyond this otherwise unsupported inference there is nothing to support such a contention.

On Monday, July 7, defense counsel requested that they be permitted to interrogate the alternate jurors including Mrs. Rohm, after the jury proper was sent out to begin deliberations (Tr. 14,503–523). I refused this request as improper for two reasons. The first was my concern for the rights of Mrs. Rohm. It was my feeling that because in disobeying my clear and oft-repeated instructions she had committed what was at a minimum a potential contempt, she should speak to no one without being informed of her constitutional rights and without the advice of counsel. The second and more important reason is that, in my opinion, permitting counsel to interview alternate jurors after discharge and during the deliberations of the jury is a bad practice. It intrudes upon the secrecy of jury deliberations and can only have the effect of inhibiting jurors from freely discussing matters and expressing views. The motion that was renewed post trial with the alternative proposal that the court make the inquiry as to the deliberations with "full particpaton by counsel." This would be even worse. It would subject jurors to examination by six defense attorneys, the prosecutor and the Court and would be unwarranted intrusion upon the secrecy of their deliberations.[3]

"The important thing is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury." *United States* v. *Klee*, 494 F. 2d 394, 396 (9th Cir. 1974) *certiorari denied*, 419

[3] "Inquiry of jurors after a verdict seeks to impugh the validity of judicial action on the ground of misconduct of a member of the tribunal. The court has a vital interest in seeing that jurors are not harassed or placed in doubt about what their duty is and that false issues are not created." *Miller* v. *United States*, 403 F. 2d 77, 82 (2d Cir. 1968).

U. S. 835 (1974). In view of the lack of any indication that premature deliberations or decisions had taken place, such an extraordinary procedure as defendants' request was clearly contraindicated. Nevertheless, after denying defense counsels' improper request, I had the jury sworn and asked them collectively in open court whether any of them had discussed the case with anyone or among themselves. No member of the jury responded to my inquiry (Tr. 14,533). I had previously offered to inquire of each juror individually and privately as to whether they had deliberated or reached premature decisions, but counsel objected to this (Tr. 14,518–521). Defendants made a conscious choice to have the case submitted to the jury without judicial inquiry as to premature deliberation in the hope that it would return verdicts favorable to them. They will not be heard to complain now that their hopes have been disappointed. The Supreme Court's language in *Johnson* v. *United States*, 318 U. S. 189, 201 (1943), is particularly apt:

> We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial.

On Tuesday, July 8 at approximately 4:00 P.M., after hearing the final closing and my charge, the alternates were dismissed with the thanks of the court and the jury sent out to deliberate.

On Wednesday, July 9, 1975, the jury twice requested in writing that certain exhibits be sent to them. Insofar as possible, these requests were complied with. On Thursday, July 10, they requested further exhibits and asked that "Meeting competition in good faith" be redefined. Those requested exhibits which had been admitted into evidence were sent out and I repeated the relevant portion of my charge. On Saturday, July 12 they asked a lengthy and confused question on the weight to be given documentary evidence. They were charged, in sum, that their

recollection of *all* the evidence in the case was controlling. The length and fervor of their deliberations is of course inconsistent with the contention that they had reached a premature decision.

On Sunday, July 13, 1975, the jury sent out a note which read: "We cannot reach a unanimous verdict. If any juror changes his mind now, it would only change due to compassion for his fellow jurors." The jury was again read the Third Circuit's modification of the Allen Charge (*Fiorovanti* v. *U. S.*, 412 F. 2d 407 (3d Cir. 1969)) which reads as follows:

> It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. *But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.* (Emphasis furnished.)

The jury was told to resume deliberations.

On Monday, July 14, the foreman of the jury, George Russell sent out the following note:

> "May I as foreman of the jury meet with you to discuss the condition of the jury and further guidance."

After meeting with counsel and their consent (Tr. 15,164–172) I met with the foreman alone in the presence of only the court reporter. Defendants' motion as to their reservation of rights on this issue is perplexing in view of the specific consent of each counsel and the individual defendants to the meeting of the court with the foreman and my stated willingness to refuse such a discussion if any objected. This contention seems to emphasize tactical considerations over candor. The transcript of our conversation was impounded but has been ordered transmitted to the Court of Appeals. The jury returned to its deliberations following that meeting and the next day, Tuesday, July 15 at approximately 10:45 A. M. the jury returned a unanimous verdict of guilty against all defendants.

My concern at the time of Foreman Russell's note was that as a layman he might inadvertently let slip information which it would not be in the best interests of justice to make public.

I have not released the transcripts to counsel since, although not apparent to any except those who were present at trial, it seems to me that some of the language used by the foreman would identify a particular juror's views to counsel and I consider this improper. As it happened. Foreman Russell's concern with with the physical condition of certain of the jurors who were bearing up less than well under the strain of prolonged deliberation. I told him that I would see that every measure possible was taken to insure the jury's health and instructed him to inform the jury that they should continue deliberating. Russell also indicated that there were personality difficulties among some jurors, a not unusual occurrence. No additional instructions were given.

It must be clearly understood that while this was a lengthy and complex case, and while the jury's deliberations were extended over some eight consecutive calendar days, nothing out of the ordinary occurred as to their deliberations. It is not the law that the jury must reach a unanimous verdict on its first vote. A certain amount of travail and discussion and hard, hard soul-searching is to be expected in the course of any jury's deliberations. Given a trial which had consumed over 4½ months of trial time and which had seen thousands of exhibits introduced into evidence, a proportionate degree of detailed and extensive deliberation must also be assumed. The jury was engaged in actual deliberation for 61½ hours. During that period the physical and emotional well being of at least some of the jury's 12 members might well be expected to waver and vary. To my mind, everything possible was done to insure that their deliberations were as comfortable as possible, given their arduous task, and to insure that nothing was done to interfere with their independent and conclusive fact-finding function.

My action in impounding the transcript of the conference with the jury foreman for *in camera* review by the Court of Appeals is in accordance with Rule 606(b) of the Federal Rules of Evidence. That rule states that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent

or dissent from the verdict or indictment or concerning his mental processes in connection therewith. • • •."

As the legislative history makes clear, this rule was designed to prevent revelation of the internal deliberations of the jury:

> Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors. S. Rep. 93–2177, U. S. Cong. & Adm. News 7060 (1974).

A poll of the jury after the return of the verdict indicated that they had reached unanimity.

Defendants make the further and, to my mind, tangential point that interrogation of jurors is necessary to explore the possibility that they were somehow tainted by publicity of the trial. Interrogation is clearly unwarranted on this basis. What publicity the ongoing trial received (contained in Court Exhibit 1) has been made to appear voluminous by the inclusion of identical Associated Press and United Press International reports which appeared in newspapers scattered throughout the country which there is little likelihood any juror or potential juror might have seen. Moreover, the jurors were repeatedly warned not to pay attention to outside publicity and never gave any indication that they ever had been exposed to extra-judicial information. Finally, at no point did the publicity of the trial ever contain the inflammatory and presumptively prejudicial statements that have necessitated new trial elsewhere. See *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *U. S. ex rel. Doggett* v. *Yeager*, 472 F. 2d 229 (3d Cir. 1973).

For all of the reasons stated above, defendants' motion is denied. It Is So Ordered this 14th day of August, 1975.

(s) Hubert I. Teitelbaum,
Hubert I. Teitelbaum,
United States District Judge.

Copies to: All Counsel.

250-346—77——5—Vol. I

EXCERPTS FROM EVIDENTIARY HEARING TRANSCRIPT

[304] HENRY LIPSKY.

DIRECT EXAMINATION

• • • • •

By Mr. GOTTSCHALK:

• • • • •

Q. What I am trying to establish, Mr. Lipsky, so we get to it, is the relationship between what has been marked as A–2 and the subsequent documents marked as I–6 and I–7. Does document A–2 reflect a formal notification to you by the Department of Justice of an intention to proceed with the grand jury investigation which subsequently led to a return of clearance to the Department of Justice from the Federal Trade Commission?

A. Yes, sir.

Q. All right. So was it some time prior to October, 1970, that you received clearance at the Federal Trade Commission from the Department of Justice to proceed with the Section 2A investigation?

A. The Federal Trade Commission's 2A investigation.

Q. It would have been prior to October?

[305] A. Yes, sir, it would.

Q. Do you recall how long before October, 1970?

A. No, sir, I don't.

• • • • •

[307] • • •

Q. All right. Now with respect to C–11—I'm sorry—A–2 Exhibit, from October 30, 1970, is it not also a fact, Mr. Lipsky, that you were informed by the Department [308] of Justice that the subject matter of the grand jury investigation that had been decided upon was to be alleged violations of the 1951 decree in the gypsum industry?

A. I so reported in the memorandum, yes, sir.

Q. All right. Now do you recall between the period 1965 and 1970 any other contacts with the Antitrust Division concerning

investigation of the gypsum industry for possible violations of Section 1 of the Sherman Act other than those that you have already talked about here?

A. No, sir, I don't.

• • • • •

Joseph E. Paige, Direct

[345] JOSEPH E. PAIGE.

DIRECT EXAMINATION

By Mr. KECK:

• • • • •

[349] • • •

Q. Mr. Paige, do you recall receiving instructions from Mr. Sarbaugh sometime after February of 1965 to begin this investigation of the gypsum wall board industry?

A. Yes.

[350] Q. Are you able to date it after February, 1965?

A. Yes, it was approximately the early part of August, 1965.

• • • • •

Q. Is it a fact that the Chicago office on August 3, 1965, was investigating the matter referred to by the Commission?

A. We were about to begin an investigation at that time. As I mentioned, the actual investigation began in the latter part of August of 1965, so this is reasonably close, yes.

[351] Q. Can you give us your recollection of what document you received from either Mr. Sarbaugh or the Anti-Trust Division in Washington, when you began this investigation?

A. Yes, there were one or two rather thin files containing various memoranda and other related documentation. It was not a significant volume of documents by any means.

Q. Now will you tell us, briefly, what you did in undertaking this investigation?

A. I requested and was granted authority to go to El Paso and in El Paso I reviewed in the Clerk's office for the district court the various exhibits which were a part of the Texas Gypsum case.

In addition to that, I reviewed various depositions which were also in the Clerk's office. I accepted certain of the memoranda and others I had sent back to Chicago.

Q. Do you recall approximately the volume of the documents that you looked at or saw in El Paso——

A. Yes.

Q. ——on this occasion?

A. Yes, there were four or five filing cabinets full of documents and exhibits. Possibly four or three. It seemed like a significant number at the time.

Q. I show you what has been marked for identification Exhibit C-16, and admitted as such this afternoon, and ask if that is your signature appearing on that motion?

[352] A. Yes, I prepared this motion and the Court signed it.

Q. How did you decide what to put in the schedule attached to this motion, C-16?

A. I conducted a cursory review of the documents and I thought it might contain a lead in the event we had a Grand Jury investigation. I thought there might be something in there that would give us a lead to bring in additional witnesses and documentation. The same is true of the depositions listed here.

Q. How long were you in El Paso on that occasion?

A. About ten days.

Q. Did you talk to any witnesses or interview any witnesses on that trip?

A. I talked to counsel of record for the Texas Gypsum Company. I tried to locate Claude Huckleberry, but he had removed from Texas. His attorney advised me he lived in Alabama or Arkansas. I had the FBI find him finally in Alabama.

Q. Did you talk to any other people in——

A. At that time, no.

Q. Were you working alone in this investigation, or did you have the assistance of others?

A. No, I worked alone.

Q. After you returned from El Paso, did you bring back [353] the documents that were ordered turned over to you by Exhibit C–17?

A. No, they were sent back by mail or express.

Q. What happened to those documents after they got back to Chicago?

A. I examined them.

Q. Over what period of time?

A. Two or three months. I am not exactly certain. After the examination they were sent back to the district clerk in El Paso.

Q. By you?

A. No, I directed they be sent back. Some clerical type apparently did it.

Q. When did you conceive the idea of requesting the assistance of the FBI in interviewing Mr. Huckleberry?

A. It was perhaps a couple of months after I returned from El Paso.

The COURT: Is Mr. Huckleberry still alive and available as a witness?

Mr. KECK: Yes, sir, he is under subpoena, Your Honor.

The WITNESS: It was perhaps a couple of months after I returned.

By Mr. KECK:

Q. Did you seek the assistance of the FBI in interviewing [354] anyone else besides Mr. Huckleberry?

A. I don't think so at that time, but I think my request was sufficiently broad in scope if they developed something, they should follow a lead. If they get another name, they could pursue that. That is my best recollection.

Q. During that period it was brought out in testimony yesterday several interviews taken by the Philadelphia office, field office of the Anti-Trust Division were sent to Chicago. I show you Exhibit D–23 which is a letter from Donald Balthis, Chief Middle Atlantic Office to John E. Sarbaugh, Chief Midwest Office, dated May 9, 1965, dealing with several interviews. Have you seen that letter before?

Mr. DELONE: 1965?

Mr. KECK: Excuse me. May 9, 1966.

The WITNESS: I have no recollection of having seen this memo.

By Mr. KECK:

Q. Do you have any recollection of seeing interviews by a Mr. Morton Fine of a Mr. Alan G. Pullen?

A. No.

Q. Or an interview by Mr. Raymond D. Cauley of a Mr. James Geppert?

A. No.

Q. Or any interviews referred to?

A. The answer is the same, no.

[355] Q. When did you determine to make a recommendation to your superior that authority be granted to impanel a Grand Jury to investigate this matter more fully?

Mr. THORSON. Objection, Your Honor. It is delving into the internal work processes of the Department of Justice.

• • • • •

The WITNESS. On two separate occasons. One, a few months after I had examined the documentation which I had brought back from Texas and the second recommendation, I think after I had received the Claude Huckleberry FBI report and learned of the Pensinger case pending down in Phoenix. That buttressed my recommendation, or so I thought.

Q. How, if you recall, did you learn about the Pensinger case?

A. Probably from BNA or the Wall Street Journal. I really don't know.

Q. Did you ever contact anyone concerning the Pensinger case?

A. Yes, I called their counsel in Phoenix.

Q. A Mr. Blumling.

A. Not Blumling, Blumley.

Q. Blumley, the gentleman Mr. Furth mentioned earlier?

[356] A. Furth's associate.

Q. What information did you learn from him?

A. We simply exchanged our various views and theories. According to the article I had seen, wherever I had seen it, that case closely paralleled my recommendations and fortified my recommendations. That was basically the conversation we had and I requested a copy of the pleadings either from him or from the clerk of the court in Phoenix, one of the two, or both.

Q. Was your recommendation in respect to Section 1 of the Sherman Act? Did it deal with that subject?

A. I think it dealt with Section 1, possibly 2, possibly the consent decree or decrees, as the case may be. It was rather broad.

Q. Did it involve price fixing?

A. Yes.

Q. Fixing of terms and condition of sale?

Yes.

Q. Material handling?

A. Yes.

Q. Predatory practices?

A. Yes.

Q. Were you aware at that time that you were formulating this concept, of a price change that had taken place in the industry effective December 15, 1965, which became the subject [357] of litigation on the west coast, known as the wall board litigation?

A. No, but I will explain that, if I may. I was following the industry very carefully and I would note various price changes in the industry. Specifically that price change, I don't know. I don't think so, but there are numerous price changes that occurred at that time.

• • • • •

[359] Q. Can you give us the approximate date when you filed your recommendations with Mr. Sarbaugh?

A. I think there were two recommendations, one in early 1966 and one somewhat later, when I received the Huckleberry FBI report. I think there were two separate recommendations. That is my best recollection.

• • • • •

[362] Q. Mr. Paige, with whom did you consult in the Chicago office with respect to these recommendations?

A. Bert Long, who was then assistant chief, was aware of the matter. He was the person with whom I counseled principally.

Q. And did you consult on more than one occasion with respect to these recommendations?

A. Oh, yes. Yes, sir.

Q. Periodically?

A. Several times.

Q. Was Mr. Long familiar with the work that you [363] were doing in the investigation?

A. Yes.

Q. Was Mr. Sarbaugh familiar with that work?

A. Yes. Copies of memos went to him. If he read them, I am certain he was aware of it.

Q. From August, 1965, when you said you began, and when would you say you finished with the last recommendation? July, 1966?

A. Yes. The record so shows. The record so shows, I think, does it not?

Q. Well, not the record disclosed to us.

Mr. DeLone. Well, those were the dates.

Q. (Continuing): The dates that the judge read off.

A. I will accept those. I have no independent recollection of the dates. I would accept those, yes.

Q. During that period Messrs. Sarbaugh and Long were familiar with the work you were doing?

A. Yes.

Q. Did you ever learn what happened to either or both of these recommendations?

A. No.

Q. Did you ever ask what hapepned to these recommendations?

A. Yes. Yes, I asked Long and received a rather cryptic reply to the effect that they had either been [364] transferred to another field office or to Washington and that was the end of it.

• • • • •

[376] Q. During this investigation, you were looking for anything relating to gypsum?

A. Yes.

• • • • •

Donald F. Melchior.

DIRECT EXAMINATION

[452] by Mr. DeLone:

Q. What was the memorandum which he displayed to you?

A. Shall I answer that question?

Q. It's not been objected to.

Mr. Thorson. We have no objection, Your Honor.

The Court. Sure.

A. The memorandum, as I recall, was a relatively short memorandum and it was addressed to Mr. Doby and it was asked that he have conducted an investigation into the gypsum industry under the shared monopoly—under a shared monop-

oly and I cannot recall the exact phraseology that followed that term but it was something in the nature of: and not by agreement or not by conspiracy.

Q. Mr. Melchior, I realize that many of the documents which I have you haven't seen them for a long time and I endeavored to provide you as soon as I had received them from the Government with certain interview reports but I haven't had an opportunity to provide you with a number of documents which were here produced this morning so you have had no opportunity to review them, but I show you a memorandum from Mr. Rashid, Deputy Director of Operations, to Mr. Doby dated October 25, 1966 and ask if that is the memorandum to which you have just made reference.

A. This is not the memorandum to which I have just made reference.

[453] Q. This memorandum refers to the authorization to conduct a full investigation of the gypsum industry.

A. I see that in those terms, yes, sir.

Q. And alludes to the fact that different phases of the industry are already or at present under investigation in Washington and Philadelphia—I'm sorry in Chicago and Philadelphia.

A. I see that on this memorandum.

The record is clear, isn't it, that my answer was this is not the memorandum to which I referred?

Q. That's correct.

Do you have any way of further identifying the memorandum to which you referred because I have not been provided with any such memorandum to the best of my knowledge. I tried to review every one that was in this time frame this morning.

A. No, other than that it was about the same date of the memorandum you showed me and my recollection was it was a shorter memorandum.

Q. Even shorter than the one-page one I showed you?

A. Yes.

Q. And did you proceed with an investigation in any event under a reporting to Mr. Doby as the chief of your section?

A. I proceeded to conduct an investigation into the [454] gypsum industry with the purpose of seeing whether it would be feasible to develop a case of shared monopoly in that field.

Q. Now in order to prepare yourself for that mission, did you review existing files in the Anti-trust Division?

A. I did.

Q. Did those files include a memorandum from Mr. Toronti?

Mr. DeLone. I guess the Court exhibits are here, are they not?

Mr. Thorson. If Your Honor please, I believe counsel is referring to a lawyer in the Division whose name was Nora Toronto.

Mr. DeLone. All right. Your Honor described the document yesterday and I haven't seen it and I didn't get the spelling right. Thank you.

By Mr. DeLone:

Q. Did you examine a memorandum from Ms. Toronto to Mr. Kilgore that had been written back in February of '65?

A. I have no independent recollection of examining any specific memo but since I reviewed the Departmental files in connection with the investigation if there was such a memorandum there, I feel I probably read it.

Q. And how far back did the Department's file go, the file which you reviewed as best you recall?

[455] A. As best I recall, they went back to the year 1948, the year I began my service with the Anti-trust Division and perhaps earlier.

Q. And did you also review the files of the Philadelphia field office which are referred to in the memorandum I showed to you from Mr. Rashid to Mr. Doby?

A. To the extent that memoranda prepared by that office were in the Washington files, I probably reviewed them.

Q. Mr. Balthis testified earlier that all the Philadelphia files were sent to Washington in November of '66 and Mr. Sarbaugh has just finished testifying that the transmittal of their materials as I believe he said at or about the same time so you believe you did review them as well.

A. I recall having read memoranda prepared by members of the Division in the Philadelphia office and the Chicago office.

Q. Did you also review material which had been transmitted to the Anti-trust Division by the Federal Trade Commission, and I have specific—particular reference to a memorandum from a J. B. Benton of the FTC to the Federal Trade Commission dated September 21, 1964 with its attachments which is

C–7 in this record? I don't expect you to know the designation, but so we know what I'm talking about and C–8A, confidential memorandum from Mr. Shea of the FTC to [456] FTC bureaus concerning alleged conspiracy and price fixing by gypsum industry members dated October 21, '64. That's C–8 in this record and another letter from Mr. Shea to Mr. Arrect, then head of the Anti-trust Division dated October 27, 1964 with attachments including the 1921 and 1951 decrees with reference to the gypsum industry which is C–9 and memorandum from Mr. Lipsky to the Federal Trade Commission dated August 17, 1965 which is C–11 in this record and a memorandum from Mr. Lipsky to Mr. Hall dated August 21, '65 which is C–12 and a copy of a letter from Mr. Shea to a T. S. Snell dated October 14, 1965 which is C–13 in this record.

A. I have no recollection of any of those specific documents. I do have the recollection with respect to the Federal Trade Commission and any materials they may have forwarded us that our files did not appear to be complete.

Q. You mean the FTC hadn't sent you the full files that they had or I don't quite understand when you say your files weren't complete.

A. I had the impression that the Departmental files did not contain all of the documentary material that ordinarily would be expected to be found therein based on other documents that I found therein.

Q. I'm just not clear about the—Bureaucratically are you referring to what the FTC had sent to the Anti-trust [457] Division or are you referring to the Anti-trust Divisions' own files?

A. I'm referring to the Anti-trust Division's own files.

Q. My question is aimed at certain documents of the FTC. Did you not examine when you began this investigation certain materials provided to the Anti-trust Division by the Federal Trade Commission?

A. I recall seeing certain materials from the Federal Trade Commission.

Q. Are you able to identify what it was that you saw at this date?

A. I am not.

Q. Do you think it would be of any help to you to show you the documents I made reference to, Mr. Melchior?

A. I'd be glad to take a look, but from my knowledge of the Federal Trade Commission documents, I'm not at all too sure they would refresh my recollection.

• • • • •

[461] By Mr. De Lone:

Q. Mr. Fricano's letter of June 28, 1972, which is A-2 in this record, states that Mr. Melchior—that Mr. Melchior—or refers to your investigation; this investigation was authorized in November, 1966 and was closed in May of 1969. Is that consistent with your recollection?

A. May of '69 doesn't seem to coincide with my recollection.

Q. We may——

A. At least insofar as my part in the investigation was concerned.

Q. I think there may be some documents which we will come to later. I don't want to tax your recollection unduly. I will try to give you those, Mr. Melchior, as we come to them.

Now, you recall——

A. As a matter of fact, counselor, I might suggest you say it was closed in May, 1969.

Q. I don't say that. That is what Mr. Fricano said in that letter, which was offered to us, which is in evidence here.

A. The investigation was not closed while I was assigned to it. It was transferred to another office.

Q. Transferred to San Francisco, was it not?

A. I believe it was.

[469] • • •

Q. Now, your pursuit of this study of the industry to see whether it would fit into the shared monopoly mould continued and involved, also, did it not, extensive interviews with geologists and engineers concerning gypsum mines, gypsum reserves, again, ease of entry, gypsum producers, locations of gypsum plants. Is that not correct?

A. Yes, I conceived that as requiring assimilation of facts dealing with all those and perhaps others.

Q. So that you travelled to various parts of the country to interview persons in these categories?

A. I attempted to interview persons from every category, activity in the gypsum field, from the mine to fabricated products.

Q. Now, there came a time, did there not, Mr. Melchoir, when you concluded that this shared monopoly idea wouldn't [470] fly, if I may use the vernacular, and you needed to go a somewhat different route?

A. There came a time when I concluded that the gypsum industry, in my own view, would not be suitable as a testing ground for the shared monopoly theory.

Q. And isn't that when you and Mr. Cook then embarked on a series of investigations concerning, or with gypsum distributors, gypsum manufacturers throughout various parts of the country—and I have in mind the period of January through May of 1968. Mr. Cook made a trip, swinging through the west, saw people at the Texas Gypsum, Republic Gypsum and a number of gypsum supply houses and you saw a Mr. Doolen, of Doolen Bauxite, and you saw the attorneys for the plaintiff in the American Gypsum versus Texas Gypsum case, and you saw the attorneys for Texas Gypsum and you interviewed them. Both you and he engaged in this extensive interviewing program.

A. Yes, you are correct, we did engage in an extensive interviewing program, but it was all part and parcel of the same study. It wasn't a new study or investigation, as your question suggested.

Q. Didn't you, at the time you were going into this phase, didn't you conclude shared monopoly was not the route to follow and you needed to follow a more conventional theory——

Mr. Thorson. Objection.

[471] Mr. DeLone. May I finish?

Mr. Thorson. I thought you were.

Mr. DeLone. May I have the question that I started read? [Partion question read.]

By Mr. DeLone:

Q. ——a more conventional theory of price fixing by agreement?

A. That is not correct.

• • • • •

[483] Q. Now, at this time in April of 1968 when you are writing Q-13, you had begun, had you not, contact with attorneys

for plaintiffs in various private trouble damage actions instituted around the country in which the gypsum companies were charged with price fixing?

A. Oh, yes, I think I had done that almost contemporaneous with the beginning of my investigation without instructions to do it.

Q. And do you recall whether you examined, for instance, the record in the Pensinger case which was started in Arizona?

A. I recall the name the Pensinger case. I have no independent recollection of what was in the record in that case, or whether I ever saw the record.

Q. And do you recall that you had the papers in the Texas Gypsum case, Texas Gypsum versus United States Gypsum, National, et al., shipped to you in Washington on March 7, on or about March 7, 1968, and kept them until March of 1969, when according to the Court's papers you were permitted to transmit them to Mr. Marcus Smith of the San Francisco office?

A. I recall getting a file from such a case, yes.

Q. And you or those working under you reviewed the papers in the Texas Gypsum case, did you not?

[484] A. Well, I have no independent recollection of who reviewed the file. I am sure if I sent for it, I must have reviewed it. I have the feeling I perhaps asked someone on the staff to review it in more detail. As I recall, it was a fairly cumbersome file, and as I recall it was the case which had elicited the interest of the Chicago office, and I was aware of what had happened to the Chicago office's inquiry into the facts involved in that case.

Q. Well, we have identified a series of exhibits in this case, Mr. Melchior, which includes complaints, depositions, answers to interrogatories which were filed in that Texas Gypsum case, B–12 through B–24, and I am just describing them generally, and do we correctly understand that those papers of that type were reviewed by your office, either you or others under your direction, in connection with the Texas Gypsum litigation?

Mr. THORSEN. Objection, Your Honor, unless the witness is shown B–12 through B–24. I don't believe the witness is familiar with those documents by that designation.

The COURT. Are you?

Mr. DELONE. I am sure he isn't familiar with them by that designation. I tried to describe the general nature of the papers.

The WITNESS. I have no independent recollection of what was in that file.

[485] By Mr. DELONE.

Q. Would it be of any help to you if I showed you what was in the file?

A. You might. I am not at all optimistic, but I will be glad to.

Q. All right.

Mr. DELONE. I ask that the witness be shown exhibits B–12 through 24, and B–26. [Various documents are handed to the witness.]

The WITNESS. I now have five of those documents before me, and I can see from the tenor of the documents that my recollection is not at all being refreshed by it. It was usually my practice, my own individual practice, if I made an interview, or reviewed a file, to summarize the contents of the interview or the file. And I recall making no memorandum of this file which indicates to me that I probably did not review it in any detail.

By Mr. DELONE:

Q. But probably assigned it to others for review?

A. That is my feeling, but I have no certainty of that. The fact that I secured it as of the date you mentioned, and I don't recall what it was——

Q. March 7, 1968 is an application filed by the United States Attorney's office in Texas which asked to have them "Remove to Washington for copying, analysis and study by [486] Mr. Melchior."

A. Based on the date you have given me, I have the feeling I may have assigned it to someone else to read because at that time I was becoming involved in the preparation of another case for trial. And as I say, I was not at all optimistic that what I would get from that file, other than general industry information, would have any great bearing as to whether or not we would file a case in the gypsum field in view of the action of the Chicago office.

Q. And what did you think you would get from the information you obtained from Mr. Blecher in San Francisco?

Mr. THORSON. Objection, Your Honor. That is calling for something purely speculative, what he thought he might get at some time in the future. As I understand the question, it

relates to what he thought prior to the time he made the request.

Mr. DeLone. He just volunteered what he thought he would get from the Texas Gypsum record. I asked him the same thing as far as Mr. Blecher.

The Court. You may answer.

The Witness. Generally it was my practice in making interviews to discuss with the person interviewed current industry conditions. I naturally did not disclose to the person interviewed the type of investigation I was conducting, but I was hopeful in each case that by interviewing [487] them and asking them to discuss current conditions in the industry I would be in a position of securing information as to what was going on, and leads to other possible interviews, and ultimately witnesses.

Q. Now, you did visit with Mr. Blecher in San Francisco, did you not?

A. Yes, I did.

Q. And you recall that Mr. Blecher provided you with depositions as they were being taken in the Wall Products cases?

A. I recall Mr. Blecher supplying me with certain information, probably depositions.

Q. If you want to see the exhibits that deal with that——

A. No, I will accept the fact. I am sure they were depositions.

Q. And that was in 1968?

A. I have no recollection as to what the date was.

Q. I show you F–19, which is your letter of March 21, 1968, to Mr. Blecher. Does that help you fix the time when you were setting it up so that you would receive copies of a deposition taken in the gypsum wall products cases?

A. Yes. I can identfiy F–19 as the letter I wrote to Mr. Blecher.

[492] • • •

By Mr. DeLone:

Q. Mr. Melchior, we had averted. I think, just before the recess to your contacts with some of the lawyers in the private cases against the gypsum companies. I'd like to call your attention to your memorandum of April 23rd, 1968 which is Q-13 ;hat you have seen before and particularly to page 3 of that

memorandum. You are talking about the interview you had conducted. You comment that they point in direction of conspiracy whether or not a conspiracy on a national basis exists is still not apparent at this time and then you go on after that paragraph and say, "The best sources of——

Mr. Thorson. Objection, your Honor, to reading——

By Mr. DeLone:

Q. [Reading] "The best sources of information as to what has transpired over the last several years is——

Mr. Thorson. If your Honor please, if I wait [493] until the question is completed, then there's no remaining point to my objection. I would like——

The Court. You don't want him to ask about that though.

Mr. Thorson. No. To read into the transcript of this record——

The Court. I'm going to let him do it and we will take it by protective order too.

By Mr. DeLone:

Q. [Reading] "The best sources of information as to what has transpired over the last several years is that which is being uncovered by treble damaged plaintiffs in suits against some of the major gypsum companies. These cases have been filed and in some cases settled in Texas, Arizona, New Mexico, California and Pennsylvania. A major share of the time I spent in my last series of interviews involved conversations with attorneys for plaintiffs in some of those cases and in securing copies of material from the files of those cases particularly interrogatory answers and depositions much of which we must borrow, reproduce and return."

You refer there to a series of interviews which you participated in and also refer to cases in Texas, Arizona, New Mexico, California and Pennsylvania. The Texas case refers to Texas Gypsum case, Texas Gypsum vs. United States?

[494] A. U.S. Gypsum.

Q. Yes. Versus U.S. and others.

A. Yes, I'm sure that must have been the one.

Q. Was the Arizona companies the Pensinger case?

A. Is that the only one in Arizona?

Q. That I know of.

A. Then that was the case.

Q. I don't know about New Mexico myself. Do you? Do you know what the New Mexico case was?

A. I have no independent recollection.

Q. And California I assume would be the Wall Products case. You have been in California talking to Mr. Furth and Mr. Blecher about that litigation in 1968.

A. That's correct.

Q. And then the Pennsylvania case. Is that the DiMarco case?

A. I'm sure it must have been the DiMarco case.

Q. And you had had discussions with Mr. Lashner who is plaintiff's counsel in the DiMarco case.

A. The name is very familiar to me and as I recall, I spoke to him on the phone.

Q. Yes, and I showed you an exhibit where he sent you a deposition. I showed you that earlier today.

A. That's correct.

• • • • •

[498] • • •

By Mr. De Lone:

Q. I show you Q–17, a memorandum from Mr. Dobey to Mr. Smith dated March 11, 1969. Did you write that memorandum? Do I correctly understand from the symbolism at the top you actually composed it, although it went over the name of your chief?

A. It indicates that myself, along with Roy Cook, composed the memo. It was a joint memorandum, apparently.

Q. And does that fix for you when it was that you transferred the files that you had to Mr. Smith in San Francisco?

A. Yes, it does.

Q. When was that?

A. The memorandum is dated March 11, 1969, and I imagine the transfer was almost contemporaneous with the memo.

Q. Because you say you are sending him something under separate cover?

A. That is right.

• • • • •

Barbara Svedberg.

DIRECT EXAMINATION

[614] • • •

A. No, this is not really a recommendation.

Q. How would you characterize that document?

The Court. I want to amend something I said. I don't know if I will have to pass on that continuing violation or not. A jury may have to pass on it.

The Witness. This is a chronological outline of the events that I had discussed in topical form in my July 3 memorandum.

By Mr. Hiering:

Q. And then there came a time later when you made a recommendation that a grand jury be impaneled; is that not correct?

A. Yes. And——

Mr. Johnson. Could we have the date of that chronological outline, Mr. Hiering?

Mr. Hiering. Yes. The exhibit is Defendants' exhibit Q–19. Is that it, Mrs. Svedberg?

The Witness. Yes.

By Mr. Hiering:

Q. It is dated July 28, 1969?

A. Yes.

Q. Do you recall the date of your recommendation for the impaneling of a grand jury? I show you Defendants'[615] exhibit Q–19–A to refresh your recollection.

A. This is dated August 6.

Q. Was that the first date on which you recommended the impaneling of the grand jury?

A. Yes.

Q. And I would like to show you Defendants' exhibit Q–20. That bears your name in the upper right-hand corner, but is otherwise undoubted, and I ask if you can tell us what the date of that document was, when it was prepared?

A. It was prepared at about the same time.

Q. And was that document that you prepared for the signature of Assistant Attorney General McClaren?

A. We just prepared a draft of these memorandums and forwarded them along with our recommendation for a grand jury

authority. They are not prepared with the assurance that they would be signed by the Attorney General.

Q. I understand, but the purpose is that if it is promising, he would then sign it?

A. Well, not necessarily. They are usually reworded, the drafts.

Q. I see.

• • • • •

CLAUDE HUCKLEBERRY.

DIRECT EXAMINATION

[723] By Mr. FRICANO:

Q. Mr. Huckleberry, were you at one time the president of the Texas Gypsum Company?

A. I was.

Q. Did you at any time attempt to complain to the Attorney General, Robert Kennedy, concerning various insundry alleged predatory practices which you believed were being aimed at your company by the major gypsum companies?

A. I asked a congresman, Congresman Rutherford of Texas, to set up an appointment at one time with Robert Kennedy.

Q. Did he do so?

A. He did.

Q. Did you travel then to Washington to see Mr. Kennedy?

A. I did.

Q. What did you intend to produce to Mr. Kennedy prior to the time that you saw him?

A. All of the violations that I had in my possession at that time, the violations of major gypsum companies against Texas Gypsum Company.

Mr. AXINN. Could the Government please fix the [724] time of these conversations.

The COURT. I am sure that he will.

By Mr. FRICANO:

Q. Mr. Huckleberry, what year was this that you met with Mr. Kennedy?

A. 1961.

• • • • •

Q. Did you get to see the Attorney General?

A. I did.

Q. Did you in fact produce to the Attorney General either orally or in writing any violations which you believed were being perpetrated against your company?

The COURT. What do you mean His reports or information concerning alleged violations?

Mr. FRICANO. Yes, yes.

The WITNESS. I did not produce any documents.

By Mr. FRICANO:

Q. Why didn't you?

A. Why didn't I? I received a call from my partner from New York City about 15 or 20 minutes before I was to meet with the Attorney General asking me not to do so.

Q. Did he give you any reason?

Mr. ARMSTRONG. Excuse me, Your Honor, but I have to object to this as being hearsay.

[725] The COURT. It isn't hearsay. Overruled.

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VALENTINE A. WEBER.

DIRECT EXAMINATION

[764] • • •

Q. In view of the death of Mr. Nabors, based [765] upon your experience and your direct connection with the Texas Gypsum case and this present indictment, which in the bill of particulars alleges this is a form of predatory act or practice, do you have any opinion as to whether United States Gypsum Company is going to be harmed by reason of the death of Mr. Nabors?

• • • • •

[766] A. Yes, I do have an opinion.

By Mr. KECK:

Q. Would you state the basis of that opinion?

A. Well, the basis of the opinion is my background as a lawyer in antitrust matters, in antitrust trials, along with my specific experience in preparing the company's defense to the

charges which are specified in the bill of particulars regarding Texas Gypsum and the alleged predatory activities. And since Mr. Nabors' geographic territory, which albeit large, is a sparsely populated area, his territory covered the area where Texas Gypsum sold and distributed the substantial majority of its wallboard. And Mr. Nabors was intimately familiar through that period of time with the various nuances of the market place and what went on in that market place and why the U. S. Gypsum Company took certain defensive steps to protect its business in that market place, and I don't know that Mr. Nabors' knowledge can be replaced. It is irretrievable.

Q. Do you have any opinion as to whether or not the death of Mr. R. H. Chandler will have any adverse effect upon the ability of U. S. Gypsum Company to defend itself against the charges in this indictment?

A. Yes, I do have an opinion.

Q. State briefly the basis of that opinion?

A. Well, the basis of the opinion is, again, my [767] experience as an antitrust trial lawyer, coupled with my specific knowledge of what Mr. Chandler would have been able to testify had he been here. He was directly involved in the decision-making process because Mr. Nabors on many occasions, although he was not the first line of decision making, he was not the final word, he would have to go to Mr. Chandler for many things, and from time to time Mr. Chandler would have to go to Mr. Sadler. But he was a key link in the decision-making process for these competitive responses.

Q. Mr. Weber, let me back up just one moment. What is your opinion with respect to whether or not United States Gypsum will be prejudiced in its defense of the indictment by reason of the death of Bill Joe Nabors? I didn't ask you for your opinion. I assumed it.

A. Well, my opinion is that they will be prejudiced because Mr. Nabors is not here.

Q. Are you of the same opinion with respect to the death of Mr. Chandler that you just testified?

A. Very definitely.

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[803] WILLIAM DONALD MCSWEENEY.

DIRECT EXAMINATION

By Mr. MONTGOMERY:

Q. Where do you live, Mr. McSweeney?

A. Chicago, Illinois.

[804] Q. What is your profession?

A. Lawyer.

Q. And with what firm are you associated?

A. Schiff, Hardin & Waite, Attorneys at law in Chicago, Illinois.

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[808] Q. In what way will the defense of Celotex and Mr. Herbert and the other defendants in this case be prejudiced by the Government's delay in filing the indictment?

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The WITNESS: Well, Mr. Miller is deceased. He died last June.

Mr. Henry Collins, the former President of Celotex, is deceased. He died in the early Seventies, in [809] approximately 1971.

Mr. Marvin Greenwood has retired from the company, and based upon my reading of his grand jury testimony, it appears to me that his memory is failing him and he does not remember as well as one would have expected of a witness, if he were still active and younger in the industry.

Those men were named in the bill of particulars as co-conspirators.

Mr. Miller for many years had the direct pricing authority in Celotex, and according to the bill of particulars, based upon what I read there, he would be able to testify if he were alive in my opinion to the competitive efforts of various sorts of Celotex. He would be able to testify and, in my view, refute the allegations that The Celotex Corporation and others were in agreements which are charged as being volative of the law.

Mr. Greenwood, I believe if he were—if his memory had not been failing, would have been able to give testimony with respect to what transpired at some meetings at which he is

charged with have been present which, from which it appears the Government in this case will either—well, will ask that an inference of conspiratorial activity be inferred.

Mr. Henry Collins, particularly in the early [810] period, back when he was active in The Celotex Corporation, would be able in my opinion to explain away any adverse inference which might be taken from his attendance at certain meetings; and in substance and sum, I think that these men all named as they were as co-conspirators, would have been very vital and favorable witnesses in the defense of this case, particularly for the company, Celotex, for which they worked, and for Mr. Herbert, the individual who is indicted here; and they would have, their testimony in my opinion would have helped the others because of the charge that various transactions, activities occurred as a result of prior agreement or conspiracy.

I think that, based upon my experience as a lawyer, having read the testimony of Mr. Miller particularly, who died, as I say, in 1971, shortly after the indictment, I would say from having read that testimony, and which is all I base it on, as having been vigorously cross-examined by Mr. Fricano, that he would make an excellent witness for the defense, that he would make an excellent impression on the jury; and as I see this indictment, read it, and the bill of particulars, I would expect that what is to be presented is a circumstantial case, an inferential case, and it is my opinion that good live witness might tip the balance in this case in favor of the defendants, in favor of the individual who is in jeopardy and the [811] corporation.

For those reasons, it seems to me that the loss of particularly Mr. Miller and also Mr. Collins, and probably to a lesser extent the failing memory of Mr. Marvin Greenwood, coupled with the other items in these affidavits, to a lesser extent those other factors, have a very—will or may have a very prejudicial effect on our defense.

[812] By Mr. MONTGOMERY:

Q. Mr. McSweeney, I think you have stated that Mr. Miller died in 1971 in your previous answer, although earlier you had said June of this year.

A. If I did, I misspoke. As I recall, Mr. Collins died in 1971. Mr. Donald Miller died recently. He died in about June of this

year, 1974, as I recall, and if I said 1971, that was a misstatement.

Q. Would the Defendants be prejudiced by the lack of having these three deceased former—well, two deceased and one retired—former Celotex officers and employees in any way other than not having them as potential witnesses?

A. Yes, they are prejudiced additionally because Mr. Miller, particularly Mr. Miller, is not available to help us in the preparation of our defense. Obviously, neither is Mr. Collins. And the assistance of Mr. Greenwood in my view will not be anywhere near as valuable as it might have been eight or nine years ago, or I don't know how many years ago, but before his memory began to fail.

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[103] • • •

EXCERPTS FROM TRIAL TRANSCRIPT

PROCEEDINGS

The Court: Now, ladies and gentlemen, you are sworn as the jurors to try the case described. Again I caution you that from this time forward you must not discuss this case with anybody outside the courtroom, and when I say anybody, I mean anybody at all.

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[132] • • •

Section 1 of the Sherman Act uses the words contract, combination, or conspiracy, and, in effect, says that any contract, combination, or conspiracy which unnecessarily restrains competition is unlawful. To centrally define these words is that those who have agreed or combined or conspired have had a meeting of minds as to what they will do. The law has not been violated unless the evidence shows that there was, in one way or the other, a conscious agreement between the competing companies, by which each company consciously committed itself to each of the others to pursue a common course of action. [133] In short, the law requires that individuals involved understand from something that was said or done that they were in fact committed to the common scheme. There is no such thing as an unwitting conspirator.

Now I have said to you that this case was brought by an indictment of a grand jury. An indictment is merely a charge, a charge that is brought and nothing else. It is in no way, in any sense at all, evidence, evidence concerning or proof of the allegations which it makes.

The grand jury which returns an indictment—I always tell people to speak into the microphone so everybody can hear, and you can see what happens when I don't do it myself—a grand jury is made up of 16 to 23 individuals. They don't sit to determine innocence or guilt. They merely sit to determine whether or not there is sufficient evidence to bring somebody to trial and to bring charges concerning it. It requires a vote of, not a unanimous vote as is required of a trial jury, but I believe a vote of 13 of the possible 23 jurors.

Now in the grand jury the defendants are not present. They don't call witnesses. Their lawyers aren't present and they don't cross-examine the witnesses. Only the prosecution is present. They call their own witnesses. They examine them without any cross-examination whatsoever. So you can see it would be grossly unfair for you to consider [134] the indictment as any proof whatsoever of innocence or guilt. You must consider it only as what it is, the charge that is to be proved before you by what we call the petty jury.

You are the trial jury. You determine innocence or guilt. The grand jury merely brought charges.

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[153] • • •

Mr. MELLOTT. We also believe that something should be said with regard to the Robinson-Patman Act, the fact that what the provisions are, that a seller cannot sell products of the same grade and quality to competing customers at different prices, and that the only exceptions to that are certain ones, including the bona fide meeting of competition, which permits—and, in fact, the law requires—that that be something more than just a [154] statement of the customer.

The COURT. Well, again, that's the kind of thing that I feel should be covered in the closing instructions and not in preliminary instructions.

You understand that, since the Court is not required to give preliminary instructions at all, it doesn't appear to me that I

should do anything more than merely tell the jury with a broad brush what is going to happen, so that they will understand general procedure. That's why I am not charging as to the law.

Mr. MELLOTT. Well, I understand that that's a matter of discretion that Your Honor has. But, when you have a trial that potentially will be as long as this one, I think it is extremely significant that certain points of law be put in the jury's mind at the beginning of the trial, so that, after they have heard . . .

The COURT. I have a feeling, Mr. Mellott, that, during the opening statements of counsel, that's going to happen.

Mr. MELLOTT. Well, of course, the law isn't supposed to be commented on in the opening statement, Your Honor.

The COURT. You shouldn't comment on the law, but you can comment on what you expect to prove, and I am sure you will. I don't want to repeat things at [155] the beginning and do it at the end again to any greater extent than is actually required, so I am not going to charge on the law at this time.

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[167] • • •

[Juror 97 entered the conference room.]

JUROR 97. 97, George Russell.

Yesterday I answered no to the questions that you had asked previously. On the one of them I forgot that I do deal with construction..

The COURT. I see.

JUROR 97. Indirectly, not directly, but I do write specifications. I do order materials, but it is all in the electrical field.

The COURT. All right.

Thank you. [Juror 97 was excused.]

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[179] Mr. MCSWEENEY. If the Court please, I object to that portion of your preliminary charge where Your Honor told this jury that a grand jury had voted to indict us and where Your Honor said that it took at least thirteen votes of a grand jury to bring this indictment. In my view that is prejudicial to my client and sufficient for reversible error. And on the basis of that objection, I move that we withdraw a juror, and I move for a mistrial.

Mr. FRICANO. That takes care of that. No. objection, Your Honor.

MR. BARTLIT. Your Honor, Andrew Watts does not join in that motion. We do not want to spend any more money that we have. We have got an individual. We are satisfied with the jury. I agree with what Mr. McSweeney says, Your Honor, but it's one of things that I guess I have to put up with, and we do not join in the motion.

The COURT. Does everybody else join in the motion?

Mr. MELLOTT. No, we will not join in the motion either, Your Honor. I agree with the grounds that were stated, but in view of the time and effort that has been invested and the fact that we are ready to go to trial now, I do not join in the motion for a mistrial.

Mr. WARNKE. I am reluctant to put my client through any additional proceedings. Accordingly, [180] I am unable to join in the motion.

The COURT. Mr. Keck.

Mr. KECK. I am unable to join in the motion.

The COURT. You will join in the motion?

Mr. KECK. Will not.

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The COURT. Does defense counsel feel that I should tell the jury that anything I said about the grand jury whatsoever should be totally disregarded?

Mr. MCSWEENEY. Your Honor, as far as I am concerned, the harm has been done. It would only aggravate it for you to say anything in addition about the grand jury.

[181] The COURT. Do you want a severance and go to trial yourself?

Mr. MCSWEENEY. Do I want a severance and go to trial myself?

The COURT. Yes.

Mr. MCSWEENEY. I have made my motion for a mistrial.

The COURT. Yes. Do you want a mistrial granted as to you alone since nobody joined in it with you?

Mr. MCSWEENEY. Yes.

The COURT. The motion is refused.

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[209] • • • Mr. FRICANO. I want to emphasize that the illegal agreement with which the Defendants are charged was not written down in any formal way. The Defendants didn't sit

around a table and say, "We hereby agree to fix prices. Signed, A. Watt, Colon Brown, J. P. Nicely." No, that's not the way it worked.

The way it worked is, as I have tried to describe to you, men talking one with the other and, by their words and by their actions, each of them knew they were committed to a certain plan or program to fix prices, agree on terms and conditions of sale, or adopt standards of packaging and handling techniques.

Now, you will be able to tell from the evidence countless, literally countless telephone conversations between these men on prices, exactly what they were up to. And what they were up to was the stabilization of prices and increasing of prices in order to maximize profits.

Now, the Antitrust Laws aren't against profits. The Antitrust Laws are to foster competition. The Antitrust Laws are the bulwark of our society, economic society—as I have indicated—in our capitalistic system. Corporations aren't prosecuted willy-nilly.

[210] Mr. MCSWEENEY. Objection to that.

The COURT. Go ahead.

Mr. FRICANO. Every corporation is entitled to a fair return. If it can make more than a fair return, more power to it, but it can't do it collusively. It can't gain a maximum profit or a stabilization of prices by reason of collusion with its competitors. If it's going to make its profit, it's going to make its profit independently.

Now, the evidence is going to show here that the collusion that these corporations are engaged in gave them profits which, normally, they would not have had. Now, that's illegal under the Antitrust Laws, assuming an agreement to do so can be shown.

Now, because the agreements which they entered into were illegal, and they were not binding on them—in other words, if one decided to cheat on the agreement—which they did, from time to time—and charge a lower price, give a better deal on packaging and handling, offer better terms or conditions of sale, they couldn't be sued. United States Gypsum couldn't go in and sue National for something like that, or vice versa. They just couldn't do it, because that agreement, in and of itself, is illegal

and wouldn't stand up in court. So what they did do about this, they had to check up on each other periodically. As businessmen being businessmen, sometimes they make mistakes. Sometimes, [211] they deliberately cheat on the agreements that were made, in order to make a little bit more money, to sell a little bit more Gypsum wallboard. What they would do is pick up the phone and talk to each other, at times almost daily, sometimes more than once a day. Each corporation would be calling the other corporation. Chief executives and others within the corporation would talk about the prices that were actually being offered in the marketplace, and these discussions would be far reaching. Not only would they discuss the prices that were being sold, but what they were going to do about it.

When a guy was caught cheating, what happened? More often than not, he apologized. He said, "Oh, that just happened. Certain circumstances came up which I had to do that, but I am not going to do it any more. I am not going to do it any more. I am going to stick to those prices, stick to the agreement that we made."

Now, they didn't use those words exactly, but you will be able to infer from the evidence which you will see and which you will hear that this is exactly what was being done.

What you should bear in mind when you are hearing this evidence on telephone conversations, on face-to-face meetings, on the very private things that they are supposed to be competing on—why were they doing it? Keep that [212] question in the forefront of your mind. Why did these Defendants trade with each other confidential internal information? The conclusion that you will reach from the evidence is, they did it.

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[215] Mr. FRICANO. • • •

Now, when times were good, when times were good, things were different. You didn't have—the Defendants didn't have to talk to each other as often, because they could get as many sales as they wished to. When the plan is operating full tilt you don't have to conspire. You don't have to get together. You check with each other periodically, because you want to make sure that the boys are staying in the club, but you really don't have to risk the degree of frequency when times are

tough. With your own common sense you can tell, I believe, that when things are good businesses don't have to get together and conspire.

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[218] • • •

Mr. FRICANO. Thank you, Your Honor.

As I started to say, Mr. Watt is going to figure very prominently in this phase of the conspiracy. The evidence will show that at one of these meetings at one of these plush resorts, at Ponte Verde in Florida Mr. Watt was put in charge of what they call the Task Force in the Gypsum Association and that Task Force's objectives seemingly, on the surface, were very legal and very righteous, very good. But the plain fact is that Task Force was a cover-up so that these defendants could get together and agree on terms and conditions of sale. It also enabled Mr. Watt to fly around the country, to visit his competitors and talk about these very things. You will hear and see evidence to that effect.

Mr. Brown and Mr. Nicely also figure very prominently in this aspect of the conspiracy. You will learn from the evidence how they, too, attempted to, whenever and wherever possible, to seek agreement with their competitors, in fact, did effect and obtain an agreement with their competitors, [219] on terms and conditions of sale.

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[221] Mr. FRICANO. It came by the infusion, injection, if you will, of the human factor to a substantial extent. For example, salesmen of the Defendant had a drive to sell wallboard so that they too would have an inspiration, if you will, to go out and plug for the company for their commission—some of them were on commission—and for salaries, larger salaries. From time to time they would generate competition when there wasn't any, and the evidence will show this, just to get a sale.

Now, actually, the Defendants checked up on this too. When they thought this was happening, they would call their competitors to inquire as to whether or not there were any deviations from their standard list prices or any deviations from their standard anticompetitive policies. And as I indicated to

you before, if on a discussion over the telephone or face-to-face at a gypsum association meeting they found out there was no deviation, that there was no cut price, that there was no deviation from a set policy, then they would stay at the higher price. They would stay with the anti-competitive practice. They would not compete one with the other in that regard.

Now, the Defendants also had an impetus to go forward and compete because it is a natural tendency of even corporate officers to compete and to try to sell more wallboard than a competitor. And from time to time they would [222] cheat—I have alluded to that before—they would take a chance, see if they were caught or not. But more often than not the system of the field reporting back to headquarters would catch up to them. The competitors would find out, and then the explanations would start. And then the practices would not be continued. This is what is known as a policing agreement. When competitors enter into an illegal agreement to fix prices or to stabilize prices because of the nature of things, they have to check on each other continually. This is called policing.

Now, even though the Defendants stifled competition whenever and wherever they found it, within their organizations and elsewhere, some competition did creep in. The question is where did it come from. Well, it started out with the customer himself. He looked up and he saw identical prices, identical policies. The evidence will show he had a way. He shopped. He would go to United States G. and say, "Give it to me for this price." If U.S.G. would not give it to him for that price, he would go then to National and say, "Give it to me for that price." He would inject himself in between them whenever and wherever possible. He would try to drive a wedge into their agreement in order to get some competition. Sometimes it worked; sometimes it didn't. But there again these competitors, these Defendants, these conspirators, got around this by telephoning each other to find [223] out if in fact the dealer, the customer, was trying to drive the wedge between them to break up the agreement. And they checked with each other. They discussed and they solved their problems in an anticompetitive fashion. By doing so, that is illegal under the law, and the evidence will show it.

Now, who is going to testify, who is going to take the witness stand and testify about illegal agreements? People who participated in them will be the ones who will testify. The ones who actually are conspirators in the crime. Now you must bear that in mind because everyone has a natural reluctance to implicate himself, so you, as the fact finders, will have to pay close attention, as I am sure you will, to the testimony of these people, and if they seem reluctant to testify, you can understand why because by doing so they implicate themselves completely in the crime charged as a coconspirator.

Now, the greatest force for competition came from without the industry; that is, without, outside, the ranks of the Defendants, the coconspirators, and that was a single plant producer as I have indicated to you earlier. He was that hard-nosed, aggressive businessman who took a look at these big companies with their fat profits, their standard old policies. They were standard and old because they never had to compete, so why improve if you don't have to compete.

[224] * * *

You will learn how United States Gypsum took on substantial quantities, huge carloads of gypsum wallboard and delivered it down to the Southwest just to try to stifle the competition of Texas Gypsum Company. You will hear how when Republic Gypsum came on stream, how they got the president of that company, a man by the name of Rhyne Simpson, got him to go to a gypsum association meeting and started telling him what to do, started telling him that they don't like his packaging and handling techniques. They didn't like him to deliver wallboard by truck because that wasn't the way the club did it. You will hear this and more from the witnesses. You will hear these Defendant corporations set about in a purposeful manner to eliminate the competition [225] of these single plant producers.

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[228] * * *

Mr. FRICANO. It's a partnership in crime, and crime doesn't surface. Criminals keep it a secret whenever and wherever pos-

sible. Ask yourselves these questions when you hear this evidence, both with your ears and see it with your eyes. Not only didn't they tell their customers what was going on, from time to time they used phony invoices. Now, as you all know, an invoice is a bill, when wallboard is purchased by a customer, sooner or later he gets this bill which is an invoice. But when the Defendant didn't charge his list price for that customer or the then going market price to that cutomer, he didn't put it down on the invoice; he would use the higher price. Why did he do that? Why wasn't he honest? Why did he use a phony or a factitious price? Simple. If, as the evidence will show, [229] he had put the lower price in that invoice, that information would have gotten out into the market. The customers, competitors, other dealers, down the street would have found out there is a lower price in the market now, and they would have wanted the same price. But could they get it? No. Why? They couldn't find out. Why couldn't they find out? Because it was a phony invoice. They kept this little conspiracy among their own tight little club, and they did everything in their power to keep it that way.

Now, you might be asking yourselves the question. If they didn't tell the truth, if they have a phony price and an invoice, how did they ever exchange information on these things? Why did they exchange information on cut prices when there were cut prices? Well, because the whole conspiracy was between the Defendants themselves, these men, and was founded on truth between themselves. If one wouldn't tell the other what he was doing, then he couldn't very well expect to be told. So from time to time he did get caught. He would tell them what he was doing. "Yes, I gave 5 percent off." And between themselves they had to be honest. They had to tell the truth, or else their conspiracy would fail. But as with anyone else, they didn't have to be. They kept it to themselves. Without truth and honesty, if I can use that term, as between themselves, they would have had no conspiracy because no one would trust the other. And what [230] would happen next? Competition.

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[238] • • •

You will also hear evidence with respect to the same fire-rated board increase that, after the price went into effect, they

got nervous because dealers were still trying to break that price, still trying to drive that wedge into that tight little club.

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[244] • • •

Mr. FRICANO. The job price protection lists were never announced publicly. There was not publishing of the fact that each of these defendants, other than U.S.G., United States Gypsum, was going to make a job protection list. How did they all do the same thing at the same time, a little bird flew in the room and left a little note?

Mr. BARTLIT. Objection, Your Honor.

The COURT. You don't intend to prove the bird flew in the room, do you?

Mr. FRICANO. No, Your Honor. I am afraid not.

The COURT. Let's get to what you are going to prove.

Mr. FRICANO. The evidence will show it wasn't a bird, plane or Superman. It was plain old telephone calls and close communications as between these defendants and conspirators. That is what the evidence will show. The evidence will also show their agreement not to meet the competition of the single plant producers was not publicized [245] either. They didn't send out letters saying, "Hey, folks, we are not going to meet competition of single plant producers."

They did not do that. That was an internal matter. But nevertheless, they all did the same thing. Why did they all do the same thing? Because they met together and agreed to do these very things, because if they didn't they would not have been able to make the price increase stick at this time. Housing starts were down. Construction was going down the drain.

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[246] Mr. FRICANO. • • •

There were meetings constantly between these people on credit. I alluded to Mr. Watt down in Ponte Verde, Florida, the Gypsum Association, his travels around at this time. There were meetings again in January relating to credit, and sure enough, after one meeting in January where the defendants got together on a trumped up ruse, as the evidence will show, U.S.G. announced new terms and conditions of sale for the industry. Then they had the second meeting and everybody else an-

nounced the exact same terms to become effective the exact same day, March 1, 1966.

Now, problems that were confronting the defendants at this time were manifold, even with respect to terms, because in putting in new terms one of the effects—and they recognized this—you put some wallboard dealers out of business. That didn't stop them. They went ahead and put the new terms in anyway, and wallboard dealers, some of them did go out of business.

The next problem that was confronting them with respect to terms was the collection of the money. When you have a lot of money owing, sometimes it is difficult to get it. You have had personal experience in that regard. The [247] problem here was not only collecting the money, but each one had to use the same method of collecting. Why? The evidence will show if they didn't use the same method of collecting, one dealer would get a better deal than the other dealer—that would be inevitable—so that competition would be generated with respect to terms.

For example, if one manufacturer said, "You can pay me off in 90 days at 3 percent", and another manufacturer didn't do exactly the same thing, say he said, "Well, you can pay me off in 60 days at 3 percent", then obviously one dealer was getting a better deal than the other and he would publicize that in the trade and other dealers would want the better deal. The dealers who got the better deal would continue to buy from the corporation that gave them the better deal. That is common sense.

The evidence will show this. So what did they do? They entered an agreement phasing out the old conditions and adopting the same procedures for collection of the money. They didn't publish this, either. It was not publicized. This was supposed to be the internal, private affairs of each and every one of these corporations. Yet, each and every one of these corporations came up with the same plan of action, exactly the same, so that these terms and conditions of sale would stick and so that there wouldn't be a competitive situation resulting therefrom. The evidence [248] will show this to your satisfaction.

The COURT. Are you going to give some thought now to concluding, Mr. Fricano? You have about used your time.

Mr. FRICANO. May I have five minutes, Your Honor?

The COURT. You have ten.

Mr. FRICANO. The evidence will show that in each of the years subsequent to 1965, for example on May 1, 1966; February 19, 1967; September, 1968; May 1, 1969; that these defendants got together and entered into an agreement on each and every one of those price changes, each and every one; that they did this in connection with their meetings, Gypsum Association and elsewhere. They did this over the telephone, as I told you, as the evidence will show.

Remember, there was competition of sorts in industry. Every once in a while somebody would deviate. They wouldn't stick to the pattern. Somebody would abandon one aspect of the conspiracy. I cannot prove a perfect conspiracy. There is no such thing as a perfect conspiracy.

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[407]

The COURT. Ladies and gentlemen of the jury. Each of the counsel who spoke to you referred to the Robinson-Patman Act. That act, insofar as it now appears to me to have any relevancy to the matter before you, provides [408] as follows:

The act prohibits—and I am not reading from the act but summing it—the act prohibits direct or indirect discrimination by a seller in price or other conditions or terms of sale if the effect of any such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce or to injure destroy, or prevent competition.

The act also provide that a seller has a complete defense to a price discrimination charge where he extends a lower price in good faith to meet a lower price of a competitor.

Now, there are other provisions of the Robinson-Patman Act. Whether or not they will become relevant in the course of this trial, I can't possibly state. If so, I will discuss those with you then. But I think every one of the attorneys who spoke to you commented on the Robinson-Patman Act; and since you must accept the law from the Court rather than from counsel, I felt it would be appropriate to discuss the Robinson-Patman Act at this time to that extent. I will undoubtedly have to make further comment concerning it in my closing instructions, but I did think that since you did hear so much about it I should say something concerning it.

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[438] • • •

Mr. HIERING .Your Honor, one other thing, that is, Mr. Thorson is referring in the offer of proof to the West Coast Litigation and certainly that has no relevance to this case, Your Honor, and is highly prejudicial and I think there should not be any evidence.

The COURT. There is not going to be any offer of testimony concerning the outcome of civil litigation, is there?

Mr. HIERING. Or the pendency of it, Your Honor.

Mr. THORSON. If Your Honor please, no, we do not intend to introduce evidence as to the outcome of the West Coast Litigation.

The COURT. I understand there were settlements of certain civil litigations and certainly that couldn't be used in evidence.

Mr. THORSON. The outcome was not in the scope of my offer of proof.

The COURT. I didn't hear anything that indicated what you are saying, either.

Mr. HIERING. He made reference to it.

The COURT. If he did, I didn't hear [439] it.

Mr. HIERING. He made reference to the litigation in his offer of proof. What he intends to offer, I don't know.

Mr. THORSON. The fact of the West Coast Litigation, the fact they were under fire or attack was what caused them to go further underground in their illicit effort. That is the fact that I included in the offer of proof, but I didn't refer to the outcome or ruling or any facts emanating to the Wall Products Litigation.

The COURT. I don't want to reference to that litigation on the civil side on the West Coast, because of the danger of getting off into settlement. You can show they were underground, if you want to, but not because of the pendency of litigation.

Mr. THORSON. If Your Honor please, I think it is germane to show the scienter of the witness, to show that is what prompted them to do certain acts and this is very revealing of the intent and purpose of the defendants.

The COURT. Under the rules of evidence relevant testimony can be excluded, if it is going to cause confusion. I think that will cause confusion, if you refer to it. You can say what they did, but if you refer to the fact there were lawsuits that were

pending, that are pending, we are going to have all kinds of problems with that.

[440] Mr. THORSON. Well, if Your Honor please, I would suggest and ask Your Honor to defer making up your mind on that point until you see, you know, the facts develop. Because I think at that point you will see more.

The COURT. I may change my mind. But, you see, I don't want you to say it in the presence of this jury. And because by then the egg will have been hatched and I won't be able to put it back in there. So, don't just ask the question in the presence of the jury in view of what I told you my present thinking is.

Mr. THORSON. Well, we understand.

The COURT. I can always change my mind, of course, but right now I don't want you to ask the witness about litigation.

Mr. THORSON. All right. Yes, Your Honor, we will abide by that admonition.

• • • • •

[445] A. VICTOR ABNEE, JR.

called as a witness and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Mr. Abnee, are you appearing here voluntarily?

A. I am answering a subpoena by the United States Government.

[446] Q. Would you please state your residence address, sir?

A. 788 Lincoln Avenue, Winnetka, Illinois.

Q. Is that a suburb of Chicago?

A. It is a village north of Chicago, yes, sir.

Q. By whom are you employed, Mr. Abnee?

A. The Gypsum Association.

Q. In what capacity?

A. I am Executive Vice President and Secretary.

Q. How long have you held that position, sir?

A. Since April of 1967.

Q. What did you do prior to that?

A. I was General Manager and Secretary of the Gypsum Association.

Q. How long did you hold that position? During what period of time?
A. About two years.
Q. That would be 1965?
A. Sir?
Q. 1965?
A. Yes. April of '65.
Q. Did you have a position with the Gypsum Association prior to that time?
A. Yes. I was Director of Trade Relations.
Q. During what period of time did you hold that position?
[447] A. From January, 1964 to April, 1965.
Q. Did you hold that position with the Gypsum Association prior to that time?
A. No, sir.
Q. By whom were you employed prior to January of 1964, Mr. Abnee?
A. U.S. Gypsum Company.
Q. When did you first go to work for United States Gypsum?
A. In late summer, 1948.
Q. In what capacity?
A. I was a clerk trainee in the Cincinnati office.
Q. In order to speed this up somewhat, Mr. Abnee, could you just describe what jobs you held with United States Gypsum and the time periods within which you held them.
A. Yes. After a few months of sales trainee job in Cincinnati, I was transferred to Huntington, West Virginia. And for approximately one year I was a paint salesman traveling in southern West Virginia and eastern Kentucky.
After about a year of that I was transferred to Dayton, Ohio. I was in Dayton, Ohio as a full-line salesman selling all building materials.
Q. Would that include gypsum wallboard, sir?
A. Yes, sir.
Q. Gypsum plaster?
[448] A. Sir, yes.
Q. Excuse me for interrupting.
A. I was in Dayton for a little over two years. I was transferred back to Cincinnati, and for approximately four years I was a gypsum drywall specialty salesman and an insulation board specialty salesman.

Q. Just exactly what is a gypsum drywall specialty salesman, Mr. Abnee?
A. I traveled the entire district specializing in selling gypsum wallboard.
Q. To whom?
A. To dealers.
Q. Did you have a particular area that you encompassed?
A. Yes, sir.
Q. What was that area?
A. All of Kentucky, southern Indiana, southern Ohio, and West Virginia.
Q. Would you continue, sir, with your description of your positions?
A. After about four years in Cincinnati I was transferred to Chicago. And I worked in the Market Research Department.
Q. Excuse me again, sir. What was your responsibility and your duties in the Market Research Department?
A. I was a statistician.
Q. Doing what?
[449] A. Working for the Director of Market Research.
Q. And what kind of work did you do in that capacity?
A. During the entire year that I worked in that department there was a reorganization of sales territories and sales responsibilities, and I spent almost the entire year working on that.
Q. Again, sir, would you please continue.
A. After about a year in Chicago, I was made Northern States District Manager in Minneapolis. I covered North Dakota, South Dakota, southern Minnesota, a little of Wisconsin, and a little of Nebraska.
Q. Doing what, sir?
A. I was sales manager having about 16 salemen under me.
[450] Q. Selling what?
A. Selling the complete line of building materials.
Q. Including gypsum wallboard and plaster?
A. Yes, sir.
Q. Continue, please.
A. After a little over two years, I was transferred back to Chicago, and I spent the next four years as—in either advertising or sales promotion type work, and I was doing that at—up until January 1964.

Q. And that is when you first joined the Gypsum Association; is that correct?

A. Yes, sir.

• • • • •

[486] • • • Q. You have testified that there are committees which report to the board of directors.

A. Yes, sir.

Q. Can you identify each committee and what it does?

A. We have a Technical Committee, and the Technical Committee is the oldest committee. That was the beginning of the Gypsum Association, in fact. It goes back to the twenties, and then there was an interim when they were dissolved, and the present Gypsum Association was started in 1930 as a gypsum technical problems association; and this Technical Committee has, as its responsibility, to delve into any research coming from the problems of the erection of our products or assembly of our products. They recommend research programs in the use of our products.

For instance, they will recommend a—and have, at many times—a continuous program of testing our products [487] and assembly of our products for fire resistance. This is probably the most prevalent activity which they engage in. They recommend research programs and testing programs to test our products in sound control, which is becoming more and more prevalent. People are becoming more aware of sound and stoppage of sound coming through the walls. They recommend programs such as structural testing and cracking tests, to see just what the strength of our product is on the wall. They will recommend programs such as—one of the latest ones is a building of an apartment building in Chicago, where they will personally supervise four floors, to study the movement of the building and the effect on our products, to try to come up with recommendations to—or perimeter relief; perimeter means the—where the joining of the wall and the ceiling, the building moves, it is going to ruin the wall, and we have to have a perimeter relief around there to allow the building to move so the board doesn't crack.

Q. Excuse me, Mr. Abnee, for interrupting you. Can you, in the interest of time alone, describe more generally the function for me? If you can't, and you want to be more precise, of course,

you may; but I suggest, if you can describe it more generally, you do it.

A. I am sorry, I went into too many of them. They are responsible for directing the association—the Technical [488] Committee is responsible for directing the association's membership in many scientific and technical organizations. They direct—the association belongs to many of these organizations, and—well, I have to give an example. The American Society of Testing and Materials, ASTM—the association staff belongs to many committees where specifications, product specifications, use specifications, and performance standards of our products are developed. We belong to the American National Standards Institute, which are applications of our products. We belong to the National Fire Association. All of these memberships are guided by the Technical Committee, and we so vote in these organizations. They are responsible for the collating of all of the industry technical literature produced by the Gypsum Association. The Technical Committee is responsible for the material that goes into it—into all of our technical literature that we supply for the companies. They direct our——

Q. Excuse me, sir. Are you still with the Technical Committee?

A. Yes, sir.

Q. Oh, okay.

A. They direct our—we are on our fourth term of maintaining a man in the National Bureau of Standards. This is a research associate that works for the association in [489] the Government's Bureau of Standards in Washington. This is the fourth one, from one to two years, where we work with the Government on all of the fire resistance and the study that the Government is making on the performance of materials in fire situations. Well, I will go on. Do you want me to rush?

• • • • •

The WITNESS. • • • Promotional Committee. The Promotional Committee is responsible for the publication and distribution of all of the association literature. Now, this is primarily technical literature that we print for the use of our members. I believe there are some 35 or 40 pieces of [490] technical literature that are produced now. They are responsible for the producing of movies that we make. I believe our library now has

about eight or nine movies, showing the application of gypsum wallboard, gypsum lath and plaster, gypsum roof decks. The new movie is called, "Beauty with Safety," on the board that we put under combustible roofs. They are responsible—the Promotional Committee is responsible for our liaison with other construction associations. This is—we keep a liaison with, for instance, the Drywall Contractors Association. The drywall contractors are the people that nail up the board and finish the joints. We have a continual relationship with them, on an educational basis. They are responsible for putting on meetings with all of these groups. They are responsible for public relations programs.

• • • • •

[491] A. Another important committee of the association is the Building Codes Committee. A primary responsibility of the Building Code Committee is to keep our members informed of the many, many changes in building codes throughout the country. Up to just a few years ago, the association was responsible for the—all cities over 100,000 in population on liaison with their building officials, to—the building codes of the country are in a constant state of change. They—we have to continually submit changes regarding our new products and new application of our products.

[492] Q. Do you ever read those submissions?

A. Sir?

Q. Do you ever read those submissions?

A. Do I read them?

Q. Yes.

A. Yes, although we have more people on our staff doing building code work than anything alse.

Q. Do those submissions encompass products?

A. Yes, sir.

Q. Well, then, you do know something about the products.

A. Yes, sir.

Q. But you couldn't answer my questions, earlier, when I was talking about——

Mr. HIERING. Your Honor, I object to those—both of those questions. They are an unfair characterization of the witness' testimony.

The COURT. Proceed.

By Mr. FRICANO:

Q. Well, Mr. Abnee, as the executive vice president, when the committees in your organization prepare documents, you do read them?

A. Yes, sir.

[493] By Mr. FRICANO:

Q. Then you are well informed?

A. I know nothing—I know nothing about sizes. Is that the question?

Q. I am talking about the question that I asked you earlier dealing with the very product for which your trade association was formed as early as 1930. That is what I am talking about.

Answer the question, Mr. Abnee.

A. Would you repeat the question?

Mr. HIERING. I didn't know there was a question pending.

Mr. FRICANO. Mr. Abnee looked at counsel as to whether he should answer question and Mr. Hiering jumped up.

Mr. HIERING. There is no question pending.

The COURT. Then what is the problem? If no question is pending, there is nothing to answer, is there?

Do you have a question?

Mr. FRICANO. If Your Honor please, I was distracted by that little eye thing there. Would the court reporter read back my last statement to the witness?

Mr. MELLOTT. If the Court please, I object to the type of comments Mr. Fricano has been making [494] and I suggest he be instructed not to do that in the future. This is his witness. He has been attempting to argue with the witness and I suggest that he be instructed to proceed simply with the questioning.

The COURT. If somebody has asked a question in an improper fashion and somebody has objected to it, I will rule on it, but nobody has objected to anything along that line so far.

I will not make a broad brush ruling.

• • • • •

Q. The question is, Mr. Abnee, do you recall my interrogation of you earlier concerning the wallboard, GX–1 and 2, sit-

ting in front of you, do you recall my question concerning their interchangeability?

A. Yes, sir.

Q. With other manufacturers?

A. Yes.

Q. You said you couldn't answer those questions, is that right?

Mr. McSweeney. I object to that, because it is a mischaracterization of his testimony and it is leading, [495] suggestive and argumentative with his own witness and I would object to the question.

The Court. I am not sure that it is not a proper characterization of the testimony.

Can you answer the question?

The Witness. I thought he referred to the questions about sizes. I know nothing about sizes. It is in none of our statistical reports. The Bureau of Mines does not report sizes. I have not been in a dealer's place for years.

The Court. All right.

By Mr. Fricano:

Q. But you were able to talk for almost five minutes by that clock about the technical committee functions.

Mr. Hiering. I object. He is arguing with the witness. It is his own witness. I object to that kind of remark on the part of Mr. Fricano.

The Court. I am going to permit him to proceed as on cross-examination. The witness is obviously difficult and I am going to let him use leading questions.

Mr. DeLone. I would take exception to your Honor's characterization of the witness.

The Court. You don't have to take exception.

Mr. DeLone. To Your Honor's remark.

[496] The Court. You have an exception automatically.

By Mr. Fricano:

Q. All right, Mr. Abnee, in the interest of time, let's go forward.

Are there any other committees you could tell us about?

A. Well, yes. I wasn't finished. That is enough on building codes.

The next is the Safety Committee. The Safety Committee conducts the safety program for the entire industry. We have, I think, at present, 76 plants reporting their accidents and their accident frequency rate and we—these are lost-time accidents. We—it is a competitive contest to see which plants have the least number of accidents. We put on safety seminars and safety programs throughout the country and invite the various plant management to come in. They deal with the new Occupational Safety and Health Act that the Government—the new Government safety regulations. They make movies, again, training movies, to show to the people in the plant proper methods to eliminate or reduce accidents, save lives.

They have a industry—they are responsible for the publication of an industry safety manual. We engage in sending out safety posters throughout the industry.

[497] We have a Traffic Committee. The Traffic Committee is the committee to keep the members informed of all the latest actions of the—of the Government and the I. C. C. We generally oppose and go to hearings—the Traffic Committee is responsible for opposing general freight increases, to study the proper methods of loading, stowing and stacking our products, and both the Materials Handling Committee and the Traffic Committee are responsible for dealing with the carriers, the railroads and the trucking organizations on legislation and the proper use of our products, loading of our products.

Well—I think that is it.

• • • • •

[498] Q. You know what minutes are?

A. Yes, sir. I am sorry. I just didn't hear you.

Q. It does meet from time to time, does it not?

A. Yes, sir.

Q. What is the composition of the membership of that committee, Mr. Abnee?

A. The different companies send different people. I would say it is about half and half. Half the companies have trans-

portation people on the Materials Handling Committee and about half have production people. It depends on the way the company is organized.

Q. How about sales officials, Mr. Abnee?

A. On the Materials Handling Committee?

Q. Yes, sir.

A. I don't think—I don't know, but I would doubt very much whether there would be anyone in sales on the Materials Handling Committee.

Q. Do you know whether or not from time to time at the request of the regular members of the Materials Handling Committee the sales officials of the defendants were present?

A. I can't recall. I would have to refresh my memory.

• • • • •

[499] Q. I would like for you to describe in more detail exactly the types and things this Materials Handling Committee concerns itself with.

A. The Materials Handling Committee is responsible for the study, trial and error study, for many years of the proper methods of loading our materials on flatcars and on trucks. They publish a manual of the best recommendations on the materials handling methods and procedures for our membership. They meet with the Association of American Railroads, because the Association of American Railroads, the AAAR, publishes a manual of mandatory rules by which our companies must, must load the cars and the—the cars, the boxcars and flatcars, in order to give the railroads the benefit of our thinking on the best methods.

They have produced films to show the proper methods [500] of loading, training films. They have conducted seminars throughout the country to teach the plant people the latest methods of loading.

I think that is about it.

The COURT. Do they ever do anything to try to package a product a little bid differently to save companies for whom they work a little money?

The WITNESS. I don't think they have anything to do with packaging, no, sir.

By Mr. FRICANO:

Q. Does this committee have anything to do palletizing?

A. They have in the past, yes, sir.

Q. What is a pallet?

A. A pallet is a flat form on which a material can be stacked so that a forklift truck can lift in one operation, lift a lot of things, a lot of materials. It is usually made out of wood and it is usually just a skeleton, so that the highlift truck, the forks of a highlift truck can enter the pallet and lift the material.

• • • • •

[524] Q. Are there any other committees, now, other than the ones you have testified to, that comprise the Gypsum [525] Association?

A. Yes, sir. The Manufacturing and Mining Committee—these are the production people from our member companies, and they have been most active in legislation, the ecology and polution legislation. They have appeared before OSHA to present our views of cleaning up our stacks, the problems we had with water pollution. The Legislative Committee appears before legislative bodies in the states on zoning restrictions—in general, most anything to do with the physical plant locations.

Q. Any other committees?

A. No, sir. At this time, there is a Tax Committee, but it is not a standing committee, and it hasn't met for years.

Q. Can you identify the membership of the association in 1973?

A. The member companies?

Q. Yes, sir.

A. American Gypsum Company; Celotex Corporation, a division of Jim Walter Corporation; Flintkote Corporation; National Gypsum Company; United States Gypsum Company; Grand Rapids Gypsum Company; Georgia-Pacific Corporation; and Kaiser Corporation.

I left out one—Temple Gypsum Company. There should be nine.

[526] Q. That is nine, sir. That is nine.

A. Yes.

Q. Was Temple Gypsum one time known as Texas Gypsum?

A. Yes, sir.

• • • • •

[548] Q. Let's go on to the semiannual meeting. Would you please, in the same fashion as you described the annual meeting, describe the semiannual meeting, where it is held, and so forth?

A. The semiannual meeting is always held in the month of October, and it is up to the board of directors to choose a place. Historically, it has been a place in the eastern half of the United States one year and the western half another year, to even out expenses of our—of the people attending. It is—it is usually at a hotel. It is a two-day meeting, rather than a one-day meeting.

At this meeting, some of the members bring their wives, and it is the same format, except the one-day meeting in the spring is now made into a two-day, mornings-only meeting.

[549] Q. At this meeting, in the fall, some wives attend, unlike the annual meeting; is that correct?

A. Yes, sir.

Q. Will you describe the kind of setting where the semiannual meeting takes place?

A. Well, they are usually very nice places. We have a golf tournament, so there is a golf course nearby.

Q. Tennis courts?

A. Sometimes, yes.

Q. Swimming pools?

A. Sometimes.

Q. Would it be fair to say that they are rather plush resorts?

A. They are very nice places.

Q. Could you go into the meetings, typical meeting sessions, on the two mornings that you say the members are together?

A. I am sorry. I was coughing—I missed the first couple of words.

Q. Could you go into the general makeup, the tenor of the meetings, on the two mornings that they occur, at the resort area?

A. Well, we usually meet at 8:30. We usually have a roll call, which is a self-introduction. Each person stands and gives his name and company. We either read the [550] minutes or ask for a motion to approve as distributed. We approve the minutes, one way or another, and we usually have a few introductory remarks by the president, outlining some of the more important things that are going to be discussed at the meeting,

and then we will have, probably, seven reports, from 15 minutes to half an hour, from each chairman. We would have a legal counsel report. I give a report. We will have a—at the annual meeting, we will have a report from the Nominating Committee to elect new officers. That is about it.

• • • • •

[556] Q. Have you ever seen Mr. Herbert from Celotex at these trade association gatherings?

A. I don't think I have.

Q. How about Mr. Harper or Mr. Costa from Kaiser Gysum?

A. I think I have seen Mr. Costa. It is—it is a chance meeting. There are rooms and rooms and rooms of exhibits, and it is who I happen to visit at the exhibits, and most of our companies will exhibit at the Home Builders Convention.

Q. Let me try a couple more names. Bear with me, if you will. How about Mr. Moran or Mr. McAdow from the Flintkote Company?

A. I can't say I have.

Q. Mr. Malhiot, M-A-L-H-O-I-T, of the Flintkote Company?

A. I don't think I have seen him.

Q. Mr. Seitz of Flintkote?

A. Yes, sir.

Q. Is there any entertainment for the members, other than the golf tournament—parties or undertakings?

A. At which meeting are you talking about, now?

Q. The semiannual meeting at the resort.

A. You were talking about the other trade associations.

[557] Q. Yes. I have gone back, now, to the semiannual meeting of the Gypsum Association, before we digressed. Are there any other activities of a social nature that are carried on the semiannual meeting as a matter of course?

A. We tried to have the ladies—a ladies' golf tournament, but very few ladies were golfers. Now, there might be one, for so many. We tried—my wife tries to take the ladies, wherever we happen to be, on a sightseeing trip or a shopping trip to something nearby. I think that is about it.

• • • • •

[605] The COURT. Now, Mr. Bartlit, go on.

Mr. BARTLIT. If the Court please. Your Honor, one of the problems that sometimes causes delay in a long conspiracy trial like this is the problem of the coconspirator rule. Normally, in many trials, when a document admissible against one defendant but not against others comes up, the other defendants object on the grounds of hearsay, and the Court turns to the jury and says: "Ladies and gentlemen, you are to consider this against this party but not against the other party. And if and when there is enough extrinsic evidence aliunde to cause linkup, then I will tell you to change your mental frame of mind."

The COURT. The defense counsel in this case made a suggestion.

Mr. BARTLIT. Yes, sir.

The COURT. That it merely be admitted without a warning. And if it isn't later connected up it be stricken. There could be a motion to strike, and I think that's a good suggestion.

Mr. BARTLIT. Yes, sir. That was our suggestion, which we have used in several recent conspiracy cases.

The COURT. Well, I couldn't do that. I don't think I should do that without the Defendants requesting it. But I think that's a good solution. And, I don't think [606] it differs in substance from the other procedure where you say, "Well, if it isn't connected I will strike it." The only difference is I don't warn the jury. And I wouldn't have warned the jury anyway if you wouldn't have asked me to. So I am not going to say anything to the jury about that. We will admit evidence as to one conspirator, statements in furtherance of the conspiracy as to one, and if it isn't later established that there was a conspiracy and that this was in furtherance of it, we will honor a motion to strike.

Mr. BARTLIT. Now, Your Honor, there was a second . . .

The COURT. Now, I haven't heard any other Defendant object to that.

Mr. DELONE. We all joined in that.

The COURT. In the motion, yes.

Mr. BARTLIT. There is a second aspect that is perhaps, in some way, is unique to this case—at least in my experience. That is this: Normally in a conspiracy case every document that comes in is admissible against one of the parties in the courtroom.

Here we have got some claimed co-conspirators that have substantial documentary evidence that are no longer here like Flintkote and Kaiser. So that it seems to me the problem is a little different here; whereas in a normal situation it would be admissible against one person prior to their [607] being a linkup, and the reason that the Court allows it to be admissible is simply because you have to start somewhere. But where you don't have anybody in a courtroom, any party in a courtroom against whom a document of a third party is admissible, it seems to me, Your Honor, that those documents shouldn't be admitted until there was evidence aliunde.

The COURT. You can do it that way if you wish. I will in those instances state that they are being admitted subject to later connection. The other way we are going to get into just utter chaos.

Mr. BARTLIT. We don't want to have that happen, that's why I made the initial suggestion.

The COURT. If the Defendants request, I will tell the jury that this is being admitted subject to later connection. And if it isn't connected, I will honor a motion to strike. I don't know whether that does help you at all.

Mr. BARTLIT. I don't either.

The COURT. Or why you want that warning. But if you do, I will be willing to do it.

Mr. BARTLIT. I don't think we will, Your Honor. Perhaps we could notify you first thing Monday morning so we have a little chance to caucus on that point.

The COURT. Sure. But the point is, of course, that there is no Defendant presently at trial. [608] However, if it is ultimately shown that there was by evidence aliunde the statements themselves of a conspiracy, and that it appears that the party making the statement was a party to the conspiracy, then it would be admissible even though they are not a party to this.

Mr. BARTLIT. Yes, sir.

The COURT. So, I will either give the warning or not give it. But I will admit the testimony subject to connection.

• • • • •

[620] • • • Q. Now, I want you to look at Government Exhibit 1784, which is to your right. And I want you to take a look at it and look in the lower right-hand corner. See the identifying

symbols? Now, I ask you if that's not the report referred to in the Dooley letter?

A. It appears to be, yes, sir.

Mr. FRICANO. I offer 1784 into evidence.

Mr. HIERING. Your Honor, may I have a question on that?

The COURT. Sure.

Mr. HIERING. Mr. Abnee, do you know whether the handwritten notation on the top of that document was on it [621] when you produced that document for the Government?

Mr. ABNEE. No, sir.

Mr. HIERING. I object to it. Your Honor.

The COURT. Let me see the document, please.

[Document handed to Judge.]

The COURT. I fail to see what significance that handwritten note has.

Mr. HIERING. Your Honor, I don't know whether it does or not.

Mr. FRICANO. If Your Honor please, I will not offer the handwritten note.

The COURT. All right. Will you have a photostat made of that excising the handwritten note?

Mr. FRICANO. Yes, Your Honor, I will.

Mr. HIERING. Your Honor, I'd like to object to it on the further ground of hearsay. There is no showing that this is a business record or that it was made in the ordinary course of business, or that the information furnished in it was furnished to the author in the ordinary course of business.

Mr. FRICANO. If Your Honor please . . .

The COURT. I am just trying to look at it.

Mr. FRICANO. Excuse me.

[622] The COURT. The exhibit will be admitted subject to excising of the handwritten note.

(Whereupon Government Exhibit No. 1784 was admitted in evidence.)

• • • • •

[642] • • •

Q. All right. I will ask you questions concerning each one of these documents. Start with the first one, which is 1884. Now, that is dated March 26 and 27, 1968; is it not?

A. Yes, sir.

Q. And that was the Wandermer Motel at Jekyll Island, [646] Georgia; is that right?

A. Yes, sir.

Q. Is that a resort area?

A. Not this place.

Q. This is the Material Handling Committee isn't it?

A. Yes, sir.

Q. It is not the sales executives and the presidents that go to the semi-annual resort area; is it?

A. No, sir.

• • • • •

[648] • • •

By Mr. FRICANO:

Q. Mr. Abnee, we go over now to page 3. I will withdraw that.

Let's go on to the next one. Now, this is another minute of the same two committees at the Newporter Inn in Newport Beach, California. Now that's not a plush place, Mr. Abnee; is it?

A. In between.

[649] Q. In between the one at Jekyll Island and, say, Ponte Vedra down in Florida?

Mr. DELONE. Object to the question. It is immaterial whether it is in between——

The COURT. I agree. It is sustained. We don't care what is plush and what isn't plush. It is what happens that counts.

• • • • •

[785] • • •

Q. Now, you read the minutes in January, didn't you, Mr. Abnee?

A. Yes, sir, many times.

Q. And those minutes don't show credit being discussed, do they?

A. No, sir.

Q. Just like many other things in your minutes don't show discussion, do they, Mr. Abnee?

Mr. MCSWEENEY. Objection.

Mr. HIERING. Oh, I object to that, Your Honor.

Mr. FRICANO. I think it a fair question under the circumstances, Your Honor.

The COURT. Well, I think it will be a fair argument, but I don't think it is really a question, so I'll sustain the objection. In the proper time, you can argue that if you want to.

Mr. FRICANO. Thank you, Your Honor.

• • • • •

[788]

Q. Mr. Abnee, did you receive plenty of notification that you were going to testify back in 1973?

A. At the Grand Jury?

Q. Yes.

A. I think so.

Q. Did you do anything to familiarize yourself with that which you might think you were going to be asked before you came?

A. Yes, sir.

Q. You did some studying, didn't you?

A. Yes, sir.

Q. Well, how come your studying, then, led to this answer that it was discussed in January, and your studying prior to this trial led you to an opposite conclusion?

A. I have refreshed my memory more. I know that credit was not mentioned at the January meeting.

Q. And Mr. Watt is a Defendant now, too, isn't he?

A. Yes, sir.

[789] Q. He wasn't back in 1973, was he?

A. I don't think so.

Q. Well, he wasn't, was he?

Mr. BARTLIT. Your Honor, I object to the intimidating nature of the questions being put by the prosecutor.

The COURT. Well, there was no indictment returned. There were no defendants at that stage, were there?

Mr. FRICANO. That's correct, Your Honor.

The COURT. All right.

[795] • • • • •

Q. Now was there anything unusual at all about this Marketing Task Force that Mr. Watt headed up?

Mr. BARTLIT. I object. I think that question is far too vague. No foundation has been laid for it.

The COURT. I think you can answer the question.

The WITNESS. Unusual?

By Mr. FRICANO:

Q. Yes.

A. I don't know what you mean by unusual. Not that I can remember.

Q. Well, it was the first time that a Board of Directors ever set itself up as a Marketing Task Force, wasn't [796] it, Mr. Abnee, and didn't you so testify before?

A. Well, I had only been there since what, a year, a year and a half? It is the first time in a year and a half that I had been with the Association that they had done so, yes.

Q. Isn't it a fair characterization that this was unusual, Mr. Abnee?

A. At that time I didn't know. I didn't think it was.

Q. Do you think so now?

A. Not particularly. I thought it was a very good objective.

Q. So it wasn't unusual for the Board of Directors to set itself up as a Marketing Task Force, correct?

Mr. HIERING. I object to that. It has been asked and answered two or three times.

The COURT: Read it to me, please.

(Question read.)

The COURT. You may answer and then we will go to something else.

The WITNESS. I didn't think it was unusual, no, sir.

By Mr. FRICANO:

Q. How many times has it happened since then?

The COURT. I just said we will go to something else, didn't I?

[797] Mr. FRICANO. I am not talking about the unusual nature. Now I am asking how many times did the Board of Directors subsequent to that period set itself up as a special Marketing Task Force.

The WITNESS. I can recall several task forces. I don't think they have ever had another marketing task force.

• • • • •

Q. That was the only one, then, from the time you joined the Association until the present?

A. As far as I can remember on marketing task forces, yes, sir.

Q. Some people would say, would they not, and would you, Mr. Abnee, when you have only one, it is unique?

Mr. HIERING. Your Honor, it is the same thing.

Mr. FRICANO. I will withdraw it, Your [798] Honor.

The COURT. All right.

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[833] • • •

JOSEPH E. FOGARTY.

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Mr. Fogarty, was there ever a man named Mr. Smaraski, an employee of the Flintkote Company?

A. Flintkote's records indicate that there was such a gentleman.

Q. Do you know in what capacity he was employed?

A. Prior to his death in 1973, he had been employed for at least a period of 7 or 8 years in both a materials handling capacity and as a warehouse technician at Flintkote's Camden, New Jersey, gypsum plant.

Q. Do you know a Mr. H. E. Beard? Was he employed by Flintkote?

A. Mr. Beard is still employed by Flintkote.

Q. Is he Mr. Smaraski's superior?

A. He is indeed.

Q. I ask you to examine Government Exhibit 1751. Can you identify it?

A. Yes, I can.

Q. What is it?

A. Government Exhibit 1751 is a 4-page internal Flintkote memorandum which is addressed on December 16, 1966 by Mr. M. Smaraski to Mr. H. E. Beard. It is a document which relates development and discussions which took place at a [834] meeting Mr. Smaraski attended in Dearborn, Michigan. The meeting was the Detroit Task Force of the Materials Handling Committee of the Gypsum Association.

Mr. FRICANO. I offer the exhibits.

Mr. MCSWEENEY. May I see it, please. Thank you.

(After examining exhibit.) I would object to the document. No foundation laid.

The COURT. May I see the document, please?

(Document handed to the Court.)

The COURT. This is a document that you produced pursuant to a subpoena, Mr. Fogarty, from the Flintkote files?

The WITNESS. All I can say, Your Honor, is that definitely is a Flintkote document. It is a document that was held by—The copyholder of that particular document was, at the time the document was drafted, an employee of the Flintkote Company in East Rutherford, New Jersey. A Mr. Newman.

The COURT. He retained the copy which you produced to the Government?

The WITNESS. That is a photocopy of Mr. Newman's copy, yes, sir.

The COURT. All right, the document will [835] be admitted.

(Whereupon, Government Exhibit No. 1751 was received in evidence.)

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[847] A. VICTOR ABNEE, Jr.

DIRECT RESUMED

By Mr. FRICANO:

Q. You will notice on page 27 of that exhibit—do you have that now?

A. Yes, sir.

Q. There was a presentation made by Mr. Watt, who was Chairman of the Special Task Force, correct?

A. Yes, sir.

Mr. FRICANO. I am going to read that to the jury, with the Court's permission.

"Many of the situations described by Mr. Hague."

By Mr. FRICANO:

Q. Who was Mr. Hague?

A. He was the Director from Kaiser at this time.

Q. Who was Mr. Moran?

A. He was the Director from Flintkote.

Q. And they had just given a presentation, had they not?
A. Yes, sir.
Q. "Many of the situations described by Mr. Hague and Mr. Moran will occur again in some new form in years to come, but looking ahead we can be sure that some will become more challenging than others. These are the climbing costs of doing business, the liability for product performance, trade group pressure, credit and collection problems."

Mr. BARTLIT: Your Honor, I would like [848] to object to the way that Mr. Fricano reads some of these documents. Now he is emphasizing things. I look at my copy and I don't see any emphasis or underlining or anything like that, so he is putting something in the record that is not there.

Mr. FRICANO. Yesterday Mr. Bartlit came to his feet and accused me of theatrics. I didn't respond, because what he was characterizing as theatrics was indignation pure and simple.

Mr. BARTLIT. I object to this speech.

The COURT: I see no objection to the way you are reading it, but please do not overdo it, though.

Mr. FRICANO. Yes, Your Honor.

The COURT. I note that when people get up to object, they also object by raising their voices and emphasizing some things and not other things. Nobody does this in a monotone. You go ahead, but don't overdo it.

Mr. FRICANO. Thank you, Your Honor.

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[863] • • • Q. Now, Mr. Colon Brown had attended that April meeting; had he not?
A. Yes, sir.
Q. Now, that was somewhat unusual—wasn't it—for Mr. Brown to be there?
A. I should clarify. I don't believe he attended the meeting. The presentation was a special presentation outside of the meeting.
Q. Well, it is part of the official minutes here, [864] Mr. Abnee?
A. Yes, sir. I believe the chief executive officers were invited for something like four o'clock, and they adjourned the meeting and gave the presentation.

• • • • •

[873] • • • Q. Was there some discussion at the meeting concerning whether or not the kind of activity contemplated by the Association on credit might be illegal?
A. No, sir. I heard several directors say that they would like to take the decision or get legal—their house counsel's legal opinion before voting.
Q. Well, maybe you misapprehend my question, Mr. Abnee.
Was there any discussion concerning legality of the Association getting into this credit thing?
A. I don't recall any, but I recall several directors saying that they wanted to get their legal opinion, they [874] didn't——
Q. They didn't—excuse me.
They didn't say why they wanted a legal opinion, they just let it go at that?
A. Yes, sir.
Well, you recall Mr. Harper's letter, don't you?

The COURT. I am sure that this was not done intentionally on your part, Mr. Fricano, but you indicate disbelief in the answer. Please don't do that at all.

Mr. FRICANO. I respectfully apologize, Your Honor.

The COURT. Don't do that, because you are not supposed to indicate what you believe or don't believe.

Mr. FRICANO. Yes, Your Honor.
May I continue, sir?
The COURT. Yes, sure.

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[905] • • • Q. Mr. Abnee, I think the language there, if you will examine it again, says the directors are investigating the possibility and advisability. Now when did the Directors [906] talk to one another? At the meetings, don't they?
A. Yes, sir.
Q. Therefore, if credit was raised at a meeting in 1967 among the directors, it should appear in the minutes, shouldn't it?
A. Well, not—I'm really not sure. I don't know what you are driving at. Isn't this a report of one of his swings around the country?
Q. This is the report, Mr. Abnee, that you were asked about the other day and I asked you in the April meeting which followed this report why nothing was mentioned concerning it. Do you remember it now, Mr. Abnee?
A. No, I really don't. I am sorry.

Q. You don't recall the other day when I asked you if this was so all fired important that Mr. Brown travelled around the country, how is it that this report not be shown in the April annual minutes of the Association?

A. I can't answer that.

Q. You couldn't answer it the other day, either, could you?

Mr. BARTLIT. I object to the tone of voice.

Mr. HIERING. I object to the repetition. That is about the sixth time.

The COURT. All right.

[907] Move forward.

By Mr. FRICANO:

Q. Now in the next paragraph, Mr. Abnee, of that letter, it says, "It is felt it would be very beneficial if we could get all the chief executive officers from the various companies to attend the annual meeting in Chicago on Wednesday, April 26, 1967."

Is that correct?

A. Yes, sir.

Q. And was that meeting well attended?

A. If that was the meeting of the Marketing Task Force, it was.

• • • • •

Q. That is Exhibit 2414. Do you have that now, Mr. [908] Abnee?

A. Yes, sir.

Q. Now this is the meeting that Mr. Brown recommends that all the chief executive officers from the various companies attend, correct?

A. Yes, sir.

Q. All right.

Now, was that well attended, Mr. Abnee?

A. The April meeting in 1967?

Q. Yes, sir.

A. Yes, it was.

Q. Very well attended, as a matter of fact, wasn't it?

A. Yes, sir.

Q. And on the second page you make the report, do you not?

A. Yes, sir.

Q. And you comment specifically about Mr. Brown being retained, do you not, as an industry consultant?

A. Yes.

Q. And you explained his primary function to the chief executive officers, did you not?

A. Yes, sir.

Q. He had already been hired, though, hadn't he?

A. Yes, sir.

[909] Q. He had already made a report to you, hadn't he?

A. Yes, sir.

Q. And he wanted to make a report at the April meeting, didn't he?

A. Not that I know of.

Q. Didn't he make the report, Mr. Abnee?

A. Did he make a verbal report at the meeting?

Q. Yes, sir.

A. Not that I recall.

Q. Mr. Abnee, in that exhibit 939, which is the Brown letter, he talked about the credit committee, that the directors are investigating. Now you look at that minute in April and you tell us whether or not there is one word in there about a credit committee.

A. In my report?

Q. Yes, sir, the one you wrote.

A. Well, I scanned it quickly. I don't see anything about credit.

Q. There is not one word in there, is there?

A. I don't think so.

Q. How do you account for that, Mr. Abnee? Didn't you have your name on these as the author of these minutes?

A. Yes, sir.

Q. And didn't you testify if it happened at the meeting, you put it in the minutes?

[910] A. Yes. I still—I still don't see that it was discussed. I am sorry.

Q. Mr. Abnee, Mr. Brown wanted it discussed?

A. He wanted it discussed.

Q. The directors were interested in it?

A. Yes, sir.

Q. He wanted a full attendance at the following month's meeting after his letter to you?

A. He wanted the chief executive officers.

Q. They are all there, but nothing is in the minutes?

Mr. WARNKE. I object. There is no indication that all the chief executive officers were present at the meeting.

• • • • •

[930] Q. Now, with this recommendation to Mr. Brown and the comments of the various members of the board of directors of the Gysum Association, did the Gypsum Association do anything about credit?

A. No, sir.

Q. Mr. Abnee, were you aware that the members of your [931] association, during the period that we have been talking about, were freely exchanging information with respect to terms and conditions of sale and credit over the telephone?

A. No, sir.

Mr. BARTLIT. Your Honor, I object to Mr. Fricano testifying.

The COURT. He hasn't. I have told the jury that the questions are not evidence. It is the answers.

The WITNESS. No, sir.

By Mr. FRICANO:

Q. Were you aware, sir, that even at your meetings, at or about the times of your meetings, that certain members of your association were exchanging credit information?

A. No, sir.

The COURT. Now, the jury will remember, again, this isn't evidence that they were. This is just a question. The evidence is that this man wasn't aware of it.

By Mr. FRICANO:

Q. In that same connection, Mr. Abnee, were you ever aware that the members of the association exchanged information relating to prices of gypsum board products between themselves over the telephone?

A. No, sir.

Q. Were you aware, sir, that, from time to time, [932] certain members of your association exchanged information relating to prices of gypsum board at the times of Gypsum Association meetings?

A. No, sir.

• • • • •

[942] • • •

By Mr. FRICANO:

Q. Now, was your grand jury testimony discussed?

A. No, sir.

Q. It was not?

A. Yes, I think it was. Yes, I am sorry. I misspoke.

Q. Did you have occasion prior to the time that you appeared here to talk with these gentlemen, to examine and read over your grand jury testimony?

A. Yes, sir.

Q. Where did you get it?

A. I got it a long time ago, months.

Q. From whom?

A. I believe I got it from Mr. Hiering.

Q. Months ago?

A. Yes, right after the grand jury.

Q. Were you allowed to keep it?

A. Yes, sir.

Q. So months ago you had your grand jury testimony in your possession, is that right?

A. Yes, sir.

Q. And with it in your possession for that period of time, did you make any attempt to advise me or anyone on behalf of the Government that your testimony relating to the [943] January, 1966 meeting was not accurate?

Mr. HIERING. I object to the relevance of that.

The COURT. It is overruled.

By Mr. FRICANO:

Q. Did you, Mr. Abnee?

A. What was the question?

Q. All the months that you had that transcript in your possession, did you at any time attempt to convey to the Government, me or any member of my staff, the fact that your testimony with respect to the January, 1966 meeting was incorrect?

Mr. HIERING. If Your Honor please, this assumes some obligation on the part of the witness which is not present.

The COURT. Now look. I ruled on this once.

The WITNESS. No, sir.

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By Mr. FRICANO:

Q. Did you discuss at this time, with these lawyers, the fact that your testimony, your grand jury testimony relating to that January, 1966 special meeting was untrue?

A. Did I relate to them?

Q. Was it discussed at this meeting with counsel?

A. Yes, sir.

• • • • •

[948]

CROSS-EXAMINATION

By Mr. HIERING:

Q. Now, Mr. Abnee, Mr. Fricano had questioned you about the April 1967 minutes of the Annual Meeting of the Gypsum Association, the membership meeting.

Mr. HIERING. Mr. Clerk, could we have Government Exhibit 2414.

By Mr. HIERING:

Q. Mr. Fricano asked you if it were not a fact that the subject of credit was not discussed at that meeting, and was not an association activity referred to at this meeting. I direct your attention to the bottom of page 3 the second to last full paragraph, particularly the last sentence of that paragraph, and ask you whether or not Mr. Fricano's implication that credit was not referred to in these minutes is true or false?

Mr. FRICANO. I object to that, Your Honor. The document speaks for itself, not what I asked the witness.

The COURT. All right. You may read the document to the jury.

Mr. HIERING. Reading, Your Honor, from these minutes of the Annual Meeting, April 26, 1967, page 3, Report of the Directors Task Force:

[949] "Mr. A. J. Watt, Chairman of the Special Task Force . . ."

Mr. BARTLIT. Your Honor, I am having a hard time hearing Mr. Hiering. If he perhaps would speak up a little.

A JUROR. We can't hear him either.

The COURT. All right. You will have to speak loudly enough, Mr. Hiering, so they can hear you.

Mr. HIERING. I am reading from the minutes of the Annual Meeting of the Association, April, 1967, Report of the Directors Task Force:

> "Mr. A. J. Watt, Chairman of the Special Task Force formed to explore and initiate programs to increase the market for the gypsum products reviewed the specific objectives. He stated that there had been progress in initiating an industry advertising program in consolidation of product listings under a general gypsum industry category and investigation of labor service fees. He reported that no active progress had been initiated in the area of more common industry testing or the initiation of an association credit program as these subjects were still being investigated by the individual member companies and two of our committees."

• • • • •

[961]

Q. Now, Mr. Abnee, just to briefly orient us here, this marketing task force was first referred to at the meeting of October, 1965; is that not correct?

A. Yes, sir.

Mr. HIERING. Your Honor, I would like to read from Government Exhibit 2442, the minutes of the meeting of the board of directors of the Gypsum Association of October 15, 1965:

> Marketing Task Force. There was then raised for discussion the general subject of utilization of industry [962] products and the possibility of expanding market opportunities.
>
> "In the ensuing discussion, it was the consensus that there were greater opportunities for the sale of gypsum products than presently were available; that there was concern within the industry as to how the market for gypsum products might be expanded to more fully utilize the every-increasing capacity in the industry, and that there might be some areas in which there could be substantial reduction in costs which were not now being fully realized.

"After discussion on motion duly seconded and unanimously carried, the following resolution was adopted:

'Whereas, it is the consensus of members of the association that greater marketing opportunities than presently exist for the sale of gypsum products can be developed, and,

'Whereas, a task force with broad authority to consider all aspects of the problem and to formulate recommendations could benefit the industry, and

'Whereas, it is not the intention to in any way impinge upon or restrict freedom of each company to develop and market new products and to otherwise take independent action as it may deem to be in its own best interests;

'Now, therefore, be it resolved, that a task force be and it is hereby established with authority to explore in any way it may deem appropriate and as may be [963] legally permissible ways and means of increasing the market potential for gypsum products, of removing obstacles to greater acceptance and use of gypsum products and of reducing costs incident thereto, including, without limitation, consideration of building code requirements and limitations, testing procedures and techniques, present concepts of use of gypsum products, and the impact of non-gypsum competitive products, and,

'Be it further resolved that the task force be and it hereby is directed to report with recommendations it deems appropriate at each meeting of the board of directors and as otherwise directed by the president.'"

By Mr. HIERING:

Q. Now, Mr. Abnee, at that same meeting, the Chairman Greenwood appointed Mr. Watt as chairman of this task force; did he not?

A. Yes, sir.

Q. And this is reflected in your letter of November 17, which is attached to the front of these minutes; is that not correct?

A. Yes, sir.

Q. When was the next occasion on which this task force was referred to at a meeting of the Gypsum Association?

A. A special meeting in January of 1966, in Chicago.

Q. Now, to back up to the October, 1965, meeting, [964] there was no reference to credit at that meeting; was there?

A. No, sir.

Q. And I believe you have already testified there was no reference to credit at the special meeting of the board of directors in January, 1966; is that not correct?

A. That's correct.

• • • • •

[980] Q. I would like to continue reading, Your Honor, from page 31 of the presentation by the Gypsum Industry Task Force at the April 1966 meeting of the Gypsum Association.

[981] Mr. Watt continuing: "Certainly there is an opportunity to develop some way, to improve the credit and collection record which has been experienced by every member company in recent years. Never has there been a time when more customers and users of our products have been searching for free capital and getting it because of a credit and collection attitude. It is possible that many of these problems could be avoided by having the association better-equipped to dispense credit information. I realize there may be legal problems connected with this, but on anything as sweeping as credit is, I believe it is worth a little work to try to find an answer."

Now, Mr. Abnee, is this the first time to your recollection that the subject of credit was referred to by the Marketing Task Force?

A. Yes, sir.

Q. And you did finally obtain an opinion of counsel; did you not?

A. Yes, sir.

Q. On the subject of credit?

A. Yes, sir.

Mr. HIERING. May the witness have Government Exhibit 938.

By Mr. HIERING:

Q. Now, Mr. Abnee, I refer you to Government Exhibit [982] 938, which is your letter to the Board of Directors dated September 9, 1966. Subject: Credit Activity. Is that correct?

A. Yes, sir.

Q. And attached to that is the letter of Mr. Snell on the letterhead of Spray, Price, Hough and Cushman, dated September 1, 1966. Is that not correct?

A. Yes, sir.

Q. Now, if you will turn to page 4 of the attachment to that letter I would like to read you the first sentence of the last paragraph of the letter:

> In summary, it is my opinion that members of a trade association can legally report and exchange data concerning delinquent accounts at least to the extent permitted by the court in the Cement case, provided there is no agreement to use that data for an illegal purpose.

Now, I would like to ask you whether you know of any time when the Gypsum Association ever considered doing anything more than the exchange of information regarding delinquent accounts that's referred to in Mr. Snell's legal opinion?

A. No, sir.

[983] Q. And, in fact, the association never did anything with regard to a credit program, did it?

A. No, sir.

Q. Was there ever any consideration whatever at any of these meetings of extended cash discount terms to customers?

A. No, sir.

Q. Was there ever any consideration or conversation, whatever, regarding withdrawal of cash discount terms at any of the association meetings?

A. No, sir.

Mr. HERRING. May the witness have Government Exhibit 2446?

Your Honor, I would like to read from Government Exhibit 2446, minutes of the meeting of the board of directors of the Gypsum Association, October 14, 1966, page six:

> Credit Activity. Mr. Hague reviewed the previous discussions on credit activity as part of the overall task force program. Member companies were to review this subject with their legal counsel.
>
> Mr. Snell reported that he had again reviewed the subject and nothing significant has occurred since the distribution of his legal opinion to the membership in August of 1966.

[984] Q. Now, Mr. Abnee, that's the document from which we just read, is it not?

A. Yes, sir.

Q. Continuing, "Mr. Fischer," and who was Mr. Fischer?

A. He was our director and president of Grand Rapids Gypsum Company.

Q. One of your single-plant producers?

A. Yes, sir.

Q. "Mr. Fischer distributed a letter from Mr. G. A. DeVries, executive vice president of the National Association of Credit Management, on the subject of association credit activity. A copy of this letter will be distributed to the directors. Further discussion of this subject was then postponed until the next meeting."

I would like to further read from the attachment to the minutes, which is on the letterhead of the National Association of Credit Management, addressed to Mr. George Fischer, Grand Rapids Gypsum Company, October 6, 1966: "Dear Mr. Fischer: You are probably aware that at the present time many industries participate in the exchange of ledger information."

Do you know what "ledger information" is, Mr. Abnee?

A. Yes, sir. Accounts receivable.

[985] Q. The credit condition of a company.

> The confidential exchange of this information is perfectly legitimate and not frowned upon by either the U.S. Department of Commerce, the Department of Justice, its Antitrust Division, and/or Better Business Bureaus. On the contrary, it is a highly regarded ethical approach being used by an increasing number of business firms in this country.

The exchange of credit experience has always been, and I hope will always remain, a valid exercise of business judgment.

Now, I ask you, Mr. Abnee, is this the type of exchange that was considered as a possible Gypsum Association program at these meetings that we have gone over?

A. That's the way I understand it; yes, sir.

Q. And was it anything beyond that?

A. No, sir.

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[1032] • • •

The COURT. All right. Now, gentlemen, I have given considerable thought and close consideration to this entire question

as to whether the prosecution should be permitted to show pendency of civil litigation on the west coast of the United States as a reason for laundering minutes of the Gypsum Association so as to cover up certain actions taken by that association or its members. That is what is before me.

Now, it seems to me that at this stage of the litigation the only relevancy such litigation, that is the civil litigation on the west coast, could have would be if the Defendants wished to introduce it to show that if there was any such laundering or cover-up it was not done because of fear of criminal prosecution but out of the desire to avoid [1033] civil liability.

Of course, if the prosecution is able to show by evidence, not by deduction, but by evidence that the laundering and resultant cover-up were for the dual purpose of avoiding both civil liability and possible criminal prosecution, then I would be inclined to reconsider the ruling.

Needless to say, if there is any evidence that minutes were laundered to avoid possible criminal prosecution that would be admissible, even though the other prong of avoiding civil liability were not.

Now, I don't want anybody to make any mistake, though. I am not ruling that these documents are not admissible in rebuttal. They well may be. Since that is so, and all the parties saw fit to make their opening statements at the close of the Government's opening statement, and everybody has indicated that they are going to make certain defenses, which, in my opinion, will probably make that evidence relevant, I am, therefore, not ruling on that yet, but I don't want anybody to be deceived that I am ruling that it won't be admissible as rebuttal.

Therefore, I suggest, to avoid recalling witnesses, Mr. Fricano can read the parts of those letters that discuss laundering or cover-up or whatever you want to call it, those parts of the letters, without referring to the west coast litigation or west coast problems.

[1034] In other words, you cannot give the reason for it. You will be able to identify the letters. We will admit them in evidence for that purpose. Then, if they should become relevant on rebuttal, we won't have to have those witnesses come back, and you will be permitted to read the rest of the letters.

But it appears to me that if they are admissible they are admissible as rebuttal and not as part of the Government's case in chief.

Mr. FRICANO. Excuse me, sir. If I understand the Court correctly, and I believe I do, if we can show that it was to cover up from prosecution, then they would be germane and relevant. In other words, we could then use them.

The COURT. Well, you can use them. There are various other reasons, possibly, why you will be able to use them.

Mr. FRICANO. Right. I understand that.

The COURT. But I don't want to rule on that now because I don't know what the defense is going to put in. You see, you can't rebut opening statements.

Mr. FRICANO. I understand that, Your Honor.

The COURT. If you could, I would let them go in right now, because—but I don't know that the [1035] Defendants are going to persist in proving what they said they were going to prove in their opening statements.

If they prove what they said they were going to prove or attempt to prove what they said they were going to prove in their opening statements, I may then allow this to come in as rebuttal.

Mr. FRICANO. Well, if Your Honor please, just one last point and I am going to sit down. I think that under Your Honor's——

The COURT. I am not going to say anything more about what I am talking about because it is not up to me to tell the defense how to defend their case with such distinguished counsel present, nor is it up to me to tell the Government what they ought to do in light of a defense in light of such distingushed counsel for the Government.

Mr. FRICANO. Distinguished counsel for the Government didn't do a very good job yesterday afternoon in this argument, I am afraid.

The COURT. You see, what you told me this morning seems to call for deduction on my part, and I don't want to deduce. I don't want to say, well, I think this is what they were doing.

Mr. FRICANO. Well, I don't think it does just because they have admitted that they knew that we were investigating them. You see, that's the point. [1036] If that evidentiary hearing brought out one thing for the Defendants, it brought

that out. They were aware that the United States Department of Justice was investigating them.

The COURT. Sure, but whether it was criminal or civil, they didn't know.

Mr. FRICANO. Well, but we are a dual agency, Your Honor, and the last time we sued them, back in 1940, for the same thing, we brought a criminal case, and they knew it.

The COURT. But each one of these letters that I have heard so far, that I have seen, referred to civil litigation, each one of them. None of them so far have said anything about criminal. If anybody had said, "Let's launder these records because we might be prosecuted criminally," it would be in, but nobody said that.

Mr. FRICANO. But the one Abbey minute, Judge, said west coast problems, not litigation. We have a field office on the west coast who at that time in the person of Barbara Svedberg was investigating these people. They made a Grand Jury investigation on the basis of her investigation.

Now, that's in the record, Judge. You can take judicial notice of that.

The COURT. Well, I don't think I can take judicial notice of something that happened out of the [1037] presence of this jury.

Mr. FRICANO. No, no in the evidentiary hearing. In the evidentiary hearing. It is in the record. It was sworn statements. They have admitted it.

[1038] The COURT. Well, I don't want to go that far Mr. Fricano. We are at a funny place here. And as I see it right now, you are entitled to show that there was a cover-up. You don't have to show the reasons for the cover-up, and I am not going to let you show the reasons for the cover-up right now. But you can show from reading parts of those documents that—something from which you can argue—I am not the finder of fact. You can argue that there was a cover-up without mentioning west coast litigation and west coast problems. But you can read those. Not the statements where one of the gentlemen said we shouldn't be putting these things in the record or anything like that. You can argue all these points.

Mr. FRICANO. If Your Honor please, if it becomes clearer as the case goes along—I realize we are just into the first few days

of it. If it becomes clearer to this court that the purpose for laundering, the purpose for not taking notes was to keep themselves legally clean so they wouldn't be prosecuted, then I assume that the ruling would be changed.

The COURT. Yes. And if you ask me to change the rule after the defendants' case and it appears to me then that it becomes admissible after rebuttal, I will change the ruling then. But I don't know. I can't predict what is going to happen.

[1039] Mr. FRICANO. See, Judge, the problem I have—I have one document that is so clear containing scienter and guilty knowledge that under this court's ruling I may not be able to use this document. It is Government Exhibit No. 29. It is the one where Atwell instructs his people not to take notes of their conversation on prices in order to keep themselves legally clean.

The COURT. You can put that in. You can put in everything that you just said to me from that document as long as you do not refer to any civil proceeding on the west coast.

Mr. FRICANO. Well, I know, Your Honor.

The COURT. You can put in that he said, "Let it out to keep themselves legally clean." You can read that to the jury.

Mr. FRICANO. All right. Now, the last paragraph though of that very document, the 3-page document, does refer to it.

> You know Mr. Gustavus, as well as many others in our company, were called upon to give depositions in a current legal situation. The reason Mr. Gustavus was included is because he at one time was given the same type of authority now being given to you. This means there is very little doubt in our minds that you could be deposed at some future date to explain your actions, so make sure you [1040] keep yourself legally clean.

The COURT. Well, that has to be civil. You can't be deposed criminally.

Mr. FRICANO. But Judge, we try to monitor these things, we try to keep up with what is going on. And if a deposition * * *

The COURT. That has nothing to do with what I am talking about now. It seems apparent to me that maybe I am not making myself very clear, so I am going to make myself quite clear as to what I am thinking of.

Every defense counsel so far has said that what they were doing was to try to avoid violation of the Robinson-Patman

Act. The first time anybody says that in evidence, all of this goes in. Now I want to make that perfectly clear, because that does rebut the contention that all this was being done merely to avoid the Robinson-Patman Act. So the first time there is any evidence of that—And the reason I am letting it in now is you don't rebut opening statements. But if the contention is that these minutes were laundered, that these acts were done, these various acts were done—credit, the method of bundling, and particularly the verification of prices—if the contention is made that these things were being done because of fear or violation of the Robinson-Patman Act, then it becomes admissible to show that there was another purpose, and it was to avoid [1041] litigation.

Now that's what I have in mind and that's the way it will be. I haven't ruled that way now, but I know what I am thinking.

Yes, Mr. Keck?

Mr. KECK. Your Honor, may I ask a clarification of that? Then I assume that that means Your Honor would read in that the west coast judge found for the defendant?

The COURT. I don't care what the west coast judge found. I am saying that if it is contended that all these things were done to avoid violation of the Robinson-Patman Act, now it appears to me to be relevant to show that people said that isn't why they were doing it, that they were doing it for some other reason.

Mr. KECK. Your Honor . . .

The COURT. I haven't ruled that way yet because the matter isn't before me.

Mr. KECK. I would ask the court if he would explain the connection between that and the cover-up issue? What does the Robinson-Patman Act have to do with that and the west coast?

The COURT. Maybe I am obtuse, but it seems to me that when a contention is raised that the only reason we did these things was to avoid violation of the [1042] Robinson-Patman Act—and now it appears that the people were saying that isn't why nobody even mentioned the Robinson-Patman Act in these letters Mr. Fricano read, it was for a different purpose altogether. And now I think that becomes relevant as to the credibility of the defense, the validity of the defense, it was being done.

Mr. KECK. I assume we have an automatic exception.

The COURT. I haven't ruled what way yet. I merely am telling you, because it was obvious that what I was talking about wasn't clear. There is no objection now, I haven't ruled that way and won't until—unless I decide that it is offered in rebuttal, that this is what I am going to do.

Mr. KECK. Your Honor, that has in it the threat that if we defend our case in certain ways then the roof is going to fall in.

The COURT. No threat whatsoever. I am merely telling you what right now I am thinking about, and you defend your case quite independently of anything I have said. [1043] Mr. MELLOTT. If the Court please, could I make just a couple comments?

The COURT. Don't argue now what might happen in rebuttal four months from now. I am not going to permit it to come in now. I will permit the letters to be identified, the documents to be identified and parts of them read to the jury.

Mr MELLOTT. One of the things I wanted to raise, I assume Your Honor will give us an opportunity to preserve our position in opposition to what you have just stated, before you rule that way.

The COURT. I have not ruled that way. I am thinking out loud, because it occurred to me nobody understood what I was thinking of when I raise it may be admissible at the time of rebuttal.

Mr. MELLOTT. Just for clarification, as I understand the point, Robinson-Patman was referred to only as a justification for verification, not the type of thing Mr. Fricano is referring to in the letter.

The COURT. I just say I don't know what the defense is going to be and I am not ruling now. There is no point in arguing now. I don't know what is going to happen.

Mr. MELLOTT. I was trying to clarify the point as to what we were saying.

The COURT. All I am saying is I will [1044] reconsider this whole matter when we come to rebuttal, and so we will not have witnesses called back, the documents can be offered, but they will not come to the attention of the jury, unless I decide it becomes relevant as to the west coast litigation. I have

not ruled that way. I don't know what is going to happen. I don't know how your defense is going in and I am not asking you and I am not telling you what to do. I don't know what your defense is going to be and how you are going to use that entire matter, so I am merely reserving that. But I don't want to have to call all these witnesses back again to identify documents.

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REDIRECT EXAMINATION

[1174] • • •

Mr. FRICANO. If the witness could have GX-929, please.

The WITNESS. 929?

Mr. FRICANO. Yes.

The WITNESS. Yes, sir.

By Mr. FRICANO:

Q. Do you recognize that exhibit?

A. Yes, sir. The first page is rough notes that I have made. The second page is a full set of my notes, rough notes. The third page is not my handwriting, it is a list of names.

[1175] Mr. HIERING. Your honor, may the witness just identify the document without describing what is in it? It is not in evidence, your Honor.

The COURT. He didn't say what is in it. He said it was a list of names.

By Mr. FRICANO:

Q. Mr. Abnee, maybe I could speed it up a little. Was the document used by the Gypsum Association produced pursuant to subpoena?

A. All of ours say GA on the bottom?

Q. Yes, sir.

Mr. FRICANO. I offer the exhibit.

Mr. HIERING. I object to this. This was beyond the 48-hour rule, when it was in effect, and not only that, when this was given to us and we pointed it out to Mr. Fricano, he said he was not going to use it with the witness and it is beyond the scope of the cross-examination.

Mr. FRICANO. May I answer? I have an answer.

This document I did not intend to use. I told them if they were going to object to it, I wouldn't use it, but Mr. Warnke

put it in issue on his cross-examination and I can establish that was the document itself.

I offer the exhibit.

The COURT. Go ahead.

[1176] Mr. DELONE. I object to the exhibit. There is no authentication. All we are told is it is something that was produced by the Gypsum Association. The form of the document, it is a lot of longhand. I have no idea what it is.

The COURT. The witness said some of it is in his handwriting, didn't he? The part that is in his handwriting is admitted. The part that is in some handwriting we don't know whose it is, it is not admitted.

Mr. BARTLIT. I will add my hearsay objection to that, also.

(Government Exhibit 929 was received in evidence.)

By Mr. FRICANO:

Q. I would like you to turn to page 3, Mr. Abnee, of that exhibit. Now, that is the page isn't in your handwriting?

A. Yes, sir.

Q. Can you identify that handwriting?

A. It appears to be Mr. Yeager's.

Mr. FRICANO. I move that in evidence.

The COURT. I don't know who Mr. Yeager is.

By Mr. FRICANO:

Q. Who is Mr. Yeager?

A. He is a consultant to the Gypsum Association. [1177] He was a former executive vice president.

The COURT. May I see the document, please?

This page 3, is that what you are referring to, the list of names?

Mr. FRICANO. Yes, Your Honor.

The COURT. That is admitted.

Mr. DELONE. If Your Honor please, I am sorry. I would like to object to that. All we have been told about that here is a page written in the handwriting of somebody who was once an officer of the Association.

The COURT. Executive secretary, consultant. Obviously it is a list of names and I am going to let it in for the purpose of finding out whether this witness knows what that list of names represents.

Br. Mr. FRICANO:

Q. Mr. Abnee——

A. Yes, sir

Q. ——those are the lists of names of some of the board of director members and some are other members of the Gypsum Association, are they not?

A. Well, they are——

Mr. WARNKE. Excuse me, Your Honor. They are names of members. He says of members of the Gypsum Association. There is no indication of that.

[1178] Mr. FRICANO. I will withdraw that.

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[1248]

FREDERICK J. ROGERS

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DIRECT EXAMINATION

By Mr. FRICANO:

Q. What is your residence address, Mr. Rogers?

A. 820 Apple Tree Lane, Highland Park, Illinois.

Q. Are you an employed person?

A. Yes, sir.

Q. By whom?

A. The Gypsum Association.

Q. In what capacity?

A. My title is Director of Administrative Services.

Q. How long have you been an employee of the Gypsum Association?

A. Since July 25, 1966.

Q. Do you have any responsibilities for materials packaging and handling within the Association?

[1249] A. Yes, sir. Since the date of my employment I have been Secretary of the Materials Handling Committee.

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[1253] • • •

(Jury not present.)

The COURT. Gentlemen.

Mr. BARTLIT. Your Honor, I determine not to raise at this point the point I had in mind.

Mr. McSweeney has a point he wants to raise.

The COURT. All right.

Mr. MCSWEENEY. If the Court please, I object to the Court's remarks which were made to Mr. Hiering, which were that we were not playing games and where the Court indicated to the jury that he concluded, as I understand—and I don't, of course, have a transcript—that the letter of Mr. Dobey called for an investigation, when the jury had heard the letter and it said the Antitrust Division wanted to make a study, a preliminary study. And it seemed to me from the Court's remarks that the Court concluded and told the jury that that meant an investigation.

The COURT. Mr. McSweeney, this is the purest semantics that I have ever heard. The term "investigation," whether you call it an investigation, an inquiry or whatever else, is absolutely purely semantics. There was no point to raising that whole matter at all.

When a person receives a letter from the Internal [1254] Revenue Service, he can say he is under audit, he is under investigation, and he can say whatever he wants. That is exactly what I said, and I think my remarks were proper and I think we ought to avoid that kind of objection, and that is what I am trying to get across. That was pure semantics and nothing more.

You put it on the record.

Bring back the jury.

Do you have something else?

Mr. MCSWEENEY. Your Honor, I have something else.

Nevertheless, the letter said "study," and the Court told the jury in contradiction of that, an interpretation we might not have wanted, it was an investigation.

The COURT. I told Mr. Fricano to call it an inquiry. That is what I told him.

I will not argue the point with you.

Go ahead and say whatever you want.

Mr. MCSWEENEY. Your Honor used the word "investigation."

The COURT. Yes, I did.

Mr. MCSWEENEY. On that ground, because of the Court's remarks, which I consider prejudicial, I move for a mistrial.

Mr. MELLOTT. If the Court please, [1255] Georgia-Pacific does not join in that motion.

Mr. FRICANO. If the Court is going to consider that, I will make an argument in opposition.

The COURT. What is United States Gypsum's view? Do you want a mistrial?

Mr. KECK. We will stand with Mr. McSweeney.

The COURT. National Gypsum?

Mr. DELONE. I support Mr. McSweeney's motion. I would like to be heard or ask Your Honor to look again at the letter, which perhaps you didn't see before, because I really don't see how you could think it was fair to characterize——

The COURT. I wasn't characterizing the letter. I was characterizing what was going on and I state to you that letter indicates to me the gypsum industry was under investigation.

Mr. DELONE. I ask Your Honor to look again at Government Exhibit 8. I have it here and I would be glad to supply a copy.

The COURT. Mr. Warnke, what is your view? Sir, do you want a mistrial?

Mr. WARNKE. I cannot support the motion at this time, Your Honor, for the same reason I said with regard to the previous motion.

[1256] The COURT. All right.

Mr. Bartlit.

Mr. BARTLIT. I will support the motion, Your Honor.

The COURT. I have read the letter and it seems to me that that letter is entirely consistent with the statement that the gypsum industry was under investigation. There is no bad connotations, necessarily, from the fact that something is under investigation. The term is used quite frequently for good things or for bad things. It is a neutral term.

The motion is refused.

Bring in the jury.

Mr. FRICANO. I might point out to the Court, the evidentiary file in this case, in this record, establishes the gypsum industry was under investigation.

The COURT. Having already decided it for you——

Mr. FRICANO. I just wanted to point that out.

The COURT. There is no question that they were under investigation.

Bring in the jury.

Before the jury is brought in, I want to put on the record, of course, some people move for a mistrial and [1257] some move against it, which leaves no option to the Court, but to refuse it.

Mr. MCSWEENEY. Well, Your Honor could grant me a mistrial without the others. Your Honor said to me the other day that would be in effect a severance.

The COURT. I could, but I don't think there is any merit whatsoever to your motion, so I am refusing it for two reasons: one, everybody didn't agree with it, and secondly, I think there is absolutely no merit to it.

Bring in the jury.

Mr. DELONE. Might I, not to argue that point, sir, but simply to say if there is grounds for a mistrial and one Defendant moves, I don't think that the others are entitled to block the Court taking whatever action is appropriate.

The COURT. There can be a severance.

Mr. DELONE. They are not bound one by another. We are each entitled to a fair trial here, separate entities.

The COURT. But there can be a severance and that is what I said to Mr. McSweeney. But you cannot grant a mistrial over somebody's objection to it but doesn't join it.

Mr. DELONE. I don't believe that with all due respect, I do not believe that is correct.

[1258] The COURT. Otherwise you would run into a double jeopardy problem, which I am sure you are aware of. When an individual defendant says, "I don't join it," and the corporate defendant says, "I don't join it," you cannot grant a mistrial and that is for certain.

Do you think you can?

Mr. DELONE. I believe you can, sir.

The COURT. Bring in the jury. That is ridiculous.

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[1285]

By Mr. FRICANO:

Q. Did Mr. Abnee have any input in revising your minutes, Mr. Rogers?

A. Between the first draft of the minutes of that meeting and the final draft, I had discussed some points that were

brought up at the meeting with Mr. Abnee, but I do not know if he had any particular input into editing or changing these minutes, no, sir.

Q. Did you discuss the legal problems with the Association members with respect to a unanimous decision to eliminate pallets?

A. I expressed my concern regarding that and a number of other things at this meeting with Mr. Abnee, yes, sir.

Q. Did Mr. Abnee tell you not to put those things in the minutes?

A. No, sir, he did not.

Q. Did he tell you how to draft the minutes in any way?

A. No, sir, he did not.

Q. Now getting back to the laundering or the cleaning up of these minutes, Mr. Rogers—

Mr. DeLone: I object to the form of that question, Your Honor.

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[1291]

By Mr. FRICANO:

Q. Where does it say in the official version of the minutes that what people were discussing the last time is in my opinion illegal?

The COURT. Not the discussion, but the carrying out of it.

By Mr. FRICANO:

Q. Or the carrying out of it, or any—yes, the carrying out of it.

A. Sir, it doesn't say anything like that at all in the final minutes.

Q. Why not?

A. When you take and compare the first draft to the final minutes, I think the fact speaks for itself, that these items are not in there and cannot be formulated as a recommendation to the full committee by a task force, because they have not been approved by legal counsel, so therefore—

Q. Even though they were discussed?

Mr. HIERING. If Your Honor please, the witness was not finished with his answer and he was interrupted again.

The WITNESS. So therefore, if it was in the first draft and not in the final draft, it would only stand to reason it was not approved by the Association counsel.

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[1293]

By Mr. FRICANO:

Q. If the members at the meeting had agreed between themselves to eliminate pallets from the problem areas, if a discussion concerning that agreement took place, and if your draft notes state that on motion seconded and carried the Task Force directed Mr. Dooley to draft a recommendation that all gypsum board pallets be eliminated for shipment into those problem areas, how would your members know that discussion and that agreement was rejected?

The COURT. All right.

Now this is what we call a hypothetical proposition. Mr. Fricano said if that happened, if they did that. That doesn't mean they did that, it did happen. What he wants to know, if that happened, how would the procedure described by the witness become known to the members of the group.

[1294] Mr. MCSWEENEY. Your Honor, I agree with your characterization of it, that it is hypothetical, and, on that basis, I object to it. It is not proper to be putting hypothetical questions to this witness.

The COURT. It is overruled.

Go ahead. You may answer the question.

The WITNESS. Sir, I would have to go—in answer to that question, I would have to go back to what I said before, and that is the fact it would be just in—the result of the legality of the matter would be contained in the final minutes, there, of the meeting.

By Mr. FRICANO:

Q. But it is not in the final minutes, is it, Mr. Rogers?

A. That's what I said before, sir. It indicates the fact that it wasn't, then.

Q. Well, then, is it your testimony that, if something occurs at the meetings that are illegal or that have illegal implications,

and it is shown to counsel, and he agrees that they have illegal implications or that they are, in fact, illegal, that the minutes then don't reflect that?

A. Sir, my first draft reflects the fact that, on a number of these points, legal counsel was requested to look into the matter to advise on the legality of it before [1295] we did anything further, sir.

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CROSS EXAMINATION

[1345] • • • Q. Now, in this particular instance of the December 1966 East Coast Task Force meeting counsel did not approve the East Coast Task Force making a recommendation to eliminate pallets; isn't that correct?

A. He did not approve, but he questioned it. He questioned this, yes, sir.

Q. Well, at the meeting he questioned it?

A. Yes, sir.

Q. And subsequently he told you that it should not be done; is that not correct?

A. That is correct.

Q. And so it was done; is that not correct? There never was a recommendation made by the East Coast Task Force to eliminate pallets; was there?

A. No, sir.

Q. So here counsel didn't just disapprove the minutes, he disapproved of what the proposed recommendation itself would be; is that not correct?

A. That is correct.

• • • • •

[1364] HENRY C. BEAR resumed the stand and, having been previously sworn, testified further as follows:

DIRECT EXAMINATION (RESUMED)

By Mr. THORSON:

Q. Mr. Bear, what is your occupation?

A. I am retired. I am acting part time as a consultant in merger and acquisition type activities.

[1365] Q. What company or firm did you retire from?

A. United States Gypsum.

Q. When did you retire?

A. The end of 1973.

Q. How long did you work for United States Gypsum?

A. Since 1936.

Q. Immediately prior to your retirement, what post or position did you occupy with United States Gypsum?

A. Vice president in charge of acquisitions.

Q. How long had you been a vice president of United States Gypsum?

A. Since 1955.

Q. 1955?

A. Yes, sir.

Q. Was it always in a position with respect to acquisitions?

A. No, sir.

Q. How long were you vice president for acquisitions?

A. Actually, I assumed some responsibility for acquisitions about 1963 and divorced myself of all other responsibilities a year or two thereafter and continued in that capacity until retirement.

Q. As vice president for acquisitions, did you have any duties or responsibilities with respect to the marketing or pricing or selling of gypsum wallboard?

[1366] A. No, sir.

Q. Have you had any such duties prior to becoming vice president for acquisitions?

A. Yes, sir.

Q. Was that prior to 1963?

A. Yes, sir.

Q. During what periods were you an officer in which you had such responsibilities and duties?

A. From May, 1959, until February, 1962.

Q. And what was your title at that time?

A. Vice president in charge of merchandising.

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[1415] • • •

Q. How about a Mr. Gimlin? Was he in your department?

A. No. Mr. Gimlin directly succeeded me when I left the merchandise department in February of '62.

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[1432]

Q. Would the granting or extension of price protection have an upward or a downward effect on market price?

A. Well, it would certainly have the effect of maintaining a prior price to certain selected jobs for a period of time subsequent to an effective date of a price increase or of an announced price increase.

Q. Would the granting of price protection have any bearing on the ability of a price increase to stick or [1433] take hold in the marketplace?

A. If it were extremely widespread, it could.

• • • • •

[1434] By Mr. THORSON:

Q. In situations, Mr. Bear, where there was a great deal of price protection offered to customers in the marketplace, at or about the time of a price increase, what effect would that have on the ability of that price increase to take hold and stick in the marketplace?

A. Well, I think I answered that question, Mr. Thorson, by saying that, if the price protection were extremely widespread, it could have limited the effectiveness of the price increase.

Now, let me answer your question again, more factually. It's my recollection, as I think I previously testified, that, in the two years that I believe are under discussion here, 1960 and 1961, we had two or three—we announced two or three price increases on gypsum board products, [1435] and, again, it wasn't across the board. It was on one or two or three specific items, during that time span, and it's my recollection that, in fact, we did make those price increases effective.

Now, that is not to say that there might not have been a few isolated cases of price protection related to those price increases, but they were the rare exception.

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[1437] • • • Q. Do you recall any use of cashier's checks or credit memoranda by gypsum producers to be given customers as an inducement to get them to purchase their products?

A. I don't recall any reports of competition having employed either cashier's checks or credit memoranda, per se. That's a pretty all-inclusive question in one sense, because it gets involved with the question of how competitive offers of lower prices were eventually handled, presuming that those lower prices were made, but, I mean, as a—direct cash offers or cash inducements or cashier's checks, I have no recollection of such offers.

Q. Well, is it your recollection that cashier's [1438] checks and credit memoranda were used by gypsum producers to implement a price reduction offered to one or some of their customers?

A. Well, I don't know how the competitors handled a reduction in price from their published prices, whether they handled it by straight billing at the lower price, whether they handled it by a credit memorandum, or whether they handled it by a cashier's check.

Q. How did U.S. Gypsum do it?

A. We handled it all three ways.

Well, wait a minute. Wait a minute. Yes, we handled it either by direct billing or by a credit memorandum, and a few very isolated cases, as I recall it, we handled it by a cashier's check.

Q. Sometimes a credit memo and sometimes, but fewer, in cashier's checks; is that right?

A. Very, very seldom; and, of course, as I say, in many cases, it was handled by direct billing. In other words, the invoice was actually billed at the reduced price in order to meet the competitor.

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[1448] By Mr. THORSON:

Q. Very well, Mr. Bear. Referring to the item on cash allowances and one of the means by which the allowance was given, one of those referenced is "credit memoranda." Can you tell us what a credit memoranda is and how it worked?

A. Well, again this was a vehicle whereby the dealer was compensated or reimbursed for a reduction in the published price of our product which we had agreed with him to make in order to meet competition, so that it showed up on his account or on his statement at the end of a period of time at which the statement was issued.

Q. Is there any way that a person, in reading a credit memorandum alone, could tell what the unit price was for the particular board product sold?

A. I don't remember what the wording was on those credit memoranda, sir. I would be reasonably sure that the credit memorandum bore a reference or cross reference to the original invoice for the product presumably at our regular published dealer price.

Q. All right.

Can you tell us what a cashier's check is and how it was used to implement a cash allowance on the sale of gypsum wallboard?

A. Well, a cashier's check—And again they are used so rarely I just faintly recall that one might have been [1449] used occasionally. It ser ·ed the same purpose as a credit memorandum.

Q. Did anything appearing on the cashier's check show what unit price the particular gypsum board had been sold at?

A. Mr. Thorson, I never saw a cashier's check. I don't know what was in it.

Q. Were cashier's checks basically untraceable?

A. I don't know this.

Q. Did the name of the company giving the cashier's check appear on the check?

The COURT. He said he never saw one.

The WITNESS. I don't know. I never saw a cashier's check, Mr. Thorson.

By Mr. THORSON:

Q. When cash allowances or discounts were given by either a credit memo or a cashier's check, what price would show on the invoice that was actually sent to the customer?

A. Our published price.

Q. The list price?

A. Yes, sir.

Mr. THORSON. If Your Honor please, I offer into evidence Exhibit GX–11.

Mr. KECK. No objection, Your Honor.

The COURT. It is admitted.

[1450] Mr. BARTLETT. Well, Your Honor, I thought Mr. Keck was going to object. I am going to object because I think it is improper for the prosecutor to make a chart of a witness' testimony while the witness testifies, and I will object for that reason.

Mr. MELLOTT. I object for the same reason, Your Honor, particularly in view of the fact that the chart does not fully and accurately set forth the testimony.

Mr. MCSWEENEY. I join the objection.

Mr. KECK. I will withdraw my objection, Your Honor—or my statement.

The COURT. All right.

The exhibit is admitted.

• • • • •

[1457]

Q. Did you ever talk to any of your competitors about the prices of gypsum wallboard?

A. Not the prices of gypsum wallboard. In very isolated cases under very controlled conditions . . .

Q. Well——

A. Excuse me.

Q. Mr. Bear, is your answer yes or no?

The COURT. Wait. He was answering. Let him answer. Go ahead.

Mr. THORSON. Well, I didn't ask him——

The COURT. I said to let him answer. Don't argue with me.

Mr. THORSON. Very well, Your Honor.

Mr. KECK. May the answer be read [1458] back as far as it was given, Your Honor?

The COURT. Yes.

[Answer read.]

The WITNESS. • • • and with the advice and consent of legal counsel I had occasion to inquire concerning the price of a specific product to a specific dealer which allegedly had been quoted by the competitor.

[1459] Q. Where did these conversations take place?

A. May I finish the answer, please? I wasn't quite through.

There was one other occasion, and that had to do with buy-and-sell discussions with a competitor. We occasionally sold competitors raw materials and/or products, which they wished to buy from us, and, on those occasions, I had occasion to talk about the price of a specific product delivered or f.o.b. one of our specific plants.

Q. Excluding those buy-sell occasions, where there were inter-company transactions, where did these conversations take place?

A. From my office, by telephone, to the competitor's office, by telephone.

Q. Were there any witnesses to these conversations?

A. I cannot speak for the competitor, of course, but, as far as I was concerned. I don't recall that there were other people present at the time I made the call.

Q. Over what period of time did these conversations take place?

A. Well, substantially during the period that I was vice president in charge of merchandising.

Q. What was said during these conversations?

A. If I initiated the call—and, again, they were very, very rare, relatively, and they were for very specific [1460] reasons and purposes—I would ask the competitor whether it was true that, as reported to me by our field selling organization, through the various reporting media that we had—whether it was true that they had quoted a given dealer a price on a specific product of so-and-so. And the presumption, of course, was that the price that I was inquiring about was below our published price to that same dealer for that commodity.

Q. And that was the situation where you placed the call?

A. That's right.

Q. And that was said with respect to that? What did the other party say to you?

A. Well, he could answer me in several different ways. He could answer yes, he could answer no, he could answer, "I don't recall," or "I don't know, I'll have to check and let you know or call you back," or he could tell me didn't care to discuss it with me.

Q. And did you receive all of such answers?

A. No, I did not.

Q. Well, which answers do you recall having received from your competitors?

A. Wait a minute. Beg your pardon. I received each of those four types of answers. I mean—maybe I misinterpreted your question, your last question.

Q. Perhaps, Mr. Bear. Your earlier answer, understood [1461] you to say that he could have said this.

A. He could have said—given me four different answers: "Yes;" "No;" "I don't care to discuss;" or "I don't know," or "I don't recall, I'll have to check."

Q. And when you say he could have, you mean that it is your recollection that, at various times, you received one of those four answers?

A. Correct.

Q. Or rather each of those four answers?

A. Well, one per inquiry.

Q. Yes. Yes, sir. When you had these phone conversations with respect to the prices, were you talking about a past price, a present price, or a future price?

A. I was talking about a price that had already been quoted.

Q. And when you were making the call, were you talking about a price that you, on behalf of U.S. Gypsum, were considering offering to a customer?

A. Never. When I was making the call?

Q. Yes, sir.

A. No, sir.

Q. Well, when you made the call, was U.S. Gypsum considering offering a certain price to a customer?

A. Well, I cannot say that we were considering. We were considering whether not to make it or to make it, either, [1462] one or the other.

Q. And you were asking the competitor about a price that U.S. Gypsum was considering offering to a customer, were you not?

A. There were a lot of other factors that went into the decision, of which knowledge or presumed knowledge of what price the competitor had offered was one.

Q. Well, is the answer to my question, "Yes"?

Mr. KECK. May the question be read back, Your Honor? I am confused as to what is the pending question.

The COURT. Read the question, please.

[Question read by Reporter.]

The COURT. Now, you can answer that yes or no and then give your explanation.

The WITNESS. The answer, in the broad context, Your Honor, would have to be yes, but the explanation——

The COURT. Well, you have given the explanation, I guess.

The WITNESS. Except—except for this, of course. A decision to do nothing or to not meet the price was also a—something that I was considering. In other words, it wasn't consideration

only of meeting this price. It could have been consideration of not to meet the [1463] price, as being a factor in arriving at that decision.

By Mr. THORSON:

Q. Well, when you made this inquiry of your competitor, were you asking him about a price that was a departure from the competitor's list price?

A. That—it would be a presumption. Certainly it was. I might not have been right up to the minute on what the competitor's list price was, but it was certainly a price different than our published list plus freight or delivered price, as the case may have been.

Q. And you, of course, knew what your competitor's list prices were; did you not?

A. Substantially.

Q. So you wouldn't have to call him to find out what his list price was at a given time; would you?

A. Well, their prices, of course, they didn't fluctuate widely or broadly, but I cannot say that, if a competitor changed his price yesterday, that I know what it was today. I didn't know what it was until we got word back from one of our field representatives that the competitor had, in fact, changed our price, and "Here is a copy of his new price list or his new announcement that I picked up in the field."

Q. When you made these calls, was the information that you sought to help you make a decision as to whether [1464] or not to offer that price to the customer?

A. Yes, sir.

• • • • •

[1466] Q. Mr. Bear, you may recall that immediately prior to the luncheon recess you were testifying concerning telephone conversations that you had with certain competitors of U.S. Gypsum, and that when you made these calls you were seeking information to help you make a determination as to whether or not to meet a price that was reported from the marketplace. Is that not correct?

A. That is correct.

And, of course, I also testified that most calls were made very rarely and under highly controlled conditions, the controls be-

ing largely advice of legal counsel that we had to under the Robinson-Patman Act sell competing dealers in the same market at equal prices and the only exception to that was basic to such inquiry as I made were to give us a basis for meeting in a—the—the equally low price of a competitor.

Q. Was that as you recall the testimony that you had given this morning in your earlier examination?

A. I wasn't asked why we made those calls. I did emphasize I thought, this morning, that we made an inquiry for the purpose that you indicated, but only under highly, rare circumstances which were controlled, as I say, to permit us to meet, in good faith, the equally low price of a competitor, as representing an exception to the Robinson-Patman Act.

Q. And you listed, did you not, four types of answers [1467] which you received in response to calls that you made of your competitors, and they were: one, yes; two, no; three, I don't recall. I will have to check; and four, I do not care to discuss it.

Is that your testimony?

A. Yes, sir.

Q. Now as to item No. 3, when the competitor said he did not recall and would have to check, did he say that he would return the call and provide you the information?

A. Sometimes he did. Sometimes he didn't.

Q. Sometimes he did or didn't say it, or sometimes he did?

A. Both.

Q. Did or didn't make the concerned call?

A. Both. He generally inferred—I would say more times than not—he would check and return the call.

Q. When he said that, did you expect him to return the call with the information?

A. I hoped he would.

Q. And when he said he did not care to discuss it, what happened then?

A. Then we used our own best judgment as to what action we would take or would not take, without benefit of a direct response from him.

Q. What happened during the conversations after the [1468] competitor said that?

A. I would hang up the receiver.

Q. Was that the end of the conversation?

A. Yes, sir.

Q. And when he said I don't recall, I will have to check, was that the end of the conversation?

A. That was the end of that conversation, yes, sir.

Q. Was anything more said?

A. Not of any substance, no, sir.

Q. When you say not of any substance——

A. All right, nothing more was said.

Q. That was the end of the conversation?

A. That is right. There could have been a pleasantry of some nature, but no further business discussion, if that was the subject of the purpose of my call.

Q. When the competitor said no, was anything else said?

A. No, sir.

Q. By either you or by him?

A. No, sir.

Q. So that was the end of the call?

A. That is right.

Q. No further conversation of any type?

A. As I say, there could have been a pleasantry or what have you, but no further business discussions.

Q. What about the instance where the answer was yes, [1469] was anything else said?

A. No, sir.

• • • • •

Q. Perhaps I can restate the question.

Was the price that you inquired of your competitor about a price which U.S. Gypsum was considering offering in the market, but preferred not to offer?

A. Well, the price was one that had been reported as having been made by the competitor. The information having come to us from our field selling organization, and it was in the case, in any case that I would have felt it desirable to call a competitor, it was probably accompanied by a request that we meet that price. So to the extent I would call the competitors, it was with the thought that it was a part of essential information that I felt it incumbent upon me, prudently, to get, if I could, as a basis for making the decision of either to meet the price or not to meet it. Now that is it.

Q. The field sales organization requested authority to meet it, did it not?

A. In some cases. I received many, many competitive [1470] reports of one nature or another that were not accompanied by a request to meet the competitive price, for one reason or another.

• • • • •

Q. If U.S. Gypsum preferred not to offer this reported lower price in the market, what would or what was your reason not to have preferred offering it?

Mr. KECK. Objected to on the grounds it is totally hypothetical. There is no evidence as to that.

The COURT. I can't understand the question, so I can't tell if it is hypothetical or not.

Would you read it back?

[Question read.]

The COURT. Couldn't we ask that question [1471] a lot simpler than that?

Mr. THORSON: Perhaps I could try, Your Honor.

The COURT. Can you understand that question? If you can, go ahead and answer it. I don't have to answer it.

The WITNESS. Well, I can try.

There are probably two reasons why we would have preferred not to have offered it. Number one, we were not sure the competitive price existed, and therefore, we were concerned about the legal implications of extending an illegal price to a dealer in the market. And the other reason that we might not have preferred to have extended the price, it might have connoted the need to reduce the price in the entire market, and we had been advised that—we had been advised it is only necessary to meet competition where we found it.

[1472] By Mr. THORSON:

Q. When you asked your competitors for this information, did you expect to receive it?

A. I did not expect anything. I hoped to receive it.

Q. Did you have any agreement with your competitors for providing this information when asked?

A. No, sir, I did not.

Q. Did you agree to provide this information to your competitors when they asked you?

A. No, sir, I did not.

Q. When your competitors said that the information was correct, and that the competitor had in fact offered the reported lower price, did he ever tell you why he offered that price?

A. Not to my recollection.

Q. When you made this request, was it to find out about a reported price that was a departure from your competitor's list price?

A. Well now, this I think I answered this morning, sir. I didn't always know this. It was a price that was different than which we normally would have quoted in the market.

Q. Did you ever ask him whether it was a departure from his list price?

A. I don't recall that I ever did.

[1473] Q. Were you interested in knowing why?

A. Why?

Q. Were you interested in knowing whether it was a departure from the competitor's list price?

A. The only thing I was interested in, sir, was whether it was different than the price that we quoted. What he quoted was his own business.

Q. Well, were you interested in knowing why he made a departure from his price, list price?

A. Well, I think I answered that. I say the answer is no. No, sir.

Q. Did your competitor ever tell you that the reported price was due to a mistake or inadvertence on the part of his company?

A. This I don't recall, sir.

Q. Did your competitor ever tell you that it was a one-shot deal, a price that would not reoccur?

A. I have no recollection of an answer of that nature.

Q. What form did the questions take when you placed these calls and had these conversations?

A. Well, I think this is repetitious, too, but I will be glad to try to repeat.

I generally stated that "We have been informed by our field selling organization that you had quoted or had sold or offered to sell a commodity at a given price to [1474] a given dealer. Do you care to tell me whether this is correct?"

Q. And when you said "a given price," was it couched in terms of a percentage off of list?

A. No. It was usually a specific price, according to the best of my recollection.

Q. So in the usual circumstance it was a specific dollar and cents price; is that right?

A. That is correct.

• • • • •

[1476] Q. Let's focus for a moment on the times when the calls were made to you. Would you tell us what form the questions took?

A. In substantially the same form that I gave you as an example, the way that we asked. In other words, the question was posed to whether in fact we had quoted "X" [dealer on "X"] product at "X" price which had been reported to them by our field sales organization.

[1477] Q. And did they sometimes ask whether the reported price was in terms of either a percentage of a dollar off of list?

A. To the best of my recollection it was in terms of dollars and cents per thousand square feet.

• • • • •

Q. And when you asked about a reported competitor's price, was that price a past price, a present price, or a future price?

A. It was a price that had been quoted. To that extent it was a past price.

Q. Was it a price that the customer in question then had an opportunity to purchase at from the competitor?

A. That was the report that we had had from our field organization, yes, sir.

• • • • •

[1480] Q. Well, now, Mr. Bear, with respect to U.S. Gypsum's action following the conversation, U.S. Gypsum would either extend the offer of that lower competitive price or it would not; it that not true?

A. We would authorize our field selling organization to offer to meet the competitive price or not; yes, sir.

Q. And was that not on the assumption and the belief that the price you were checking on was a continuing offer by the competitor?

A. I don't know what you mean by continuing. The only——

The COURT. He means that the deal hadn't been closed yet. Isn't that what you are asking about?

Mr. THORSON. Yes, sir.

By Mr. THORSON:

Q. That the customer still had that opportunity to purchase at that reported price from the competitor.

A. Well, the reason I am hesitating is that I think there have been times when a dealer may have committed to the competitor and when we offered to meet the price, after determining that it existed. I think there may have been times when we might have been able to take the order away from the competitor, and, in those cases, their price, of course, still existed, the competitive price.

[1481] Q. When the competitor denies to you that the reported price was, in fact true; in other words, said "no," what actions did U.S. Gypsum take with respect to that instance?

A. To the best of my recollection, we refused to approve the requested price adjustment submitted by our field selling organization.

Q. So did you continue to offer the list price to that customer?

A. Yes, sir.

Q. And when the competitor said, "Yes," and acknowledged that the reported price was true, what action did U.S. Gypsum take?

A. I would say we did—alternately, we approved the price adjustment or the request for the price exception, or, in a few cases, even though the competitive price was substantiated, we may have elected not to meet it.

Q. If you found that the competitive price was, as you say, substantiated, and you elected not to meet it, what was your reason for making the call in the first place?

A. Further analysis of other facts, further consideration of other facts that were involved in the case.

Q. Was it to check up on your competitor to find out what he was doing?

A. No, sir.

[1482] Q. Was it to police an agreement to maintain uniform list prices?

A. No, sir.

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Q. Now, in the instance where your competitors called you seeking this information, what business reason did you have, or U.S. Gypsum have, for responding to those calls?

A. I think it's a combination of personal, business, and legal reasons. Not attempting to be hypocritical, I [1483] always believed that honesty is the best policy. And our attorneys have always told me that under properly controlled conditions it was perfectly legal that I respond to such a request, and I anticipated, when a competitor called me, that he probably, or quite likely, had a Robinson-Patman problem that he was attempting to find an answer to, and I could hurriedly connote that under similar circumstances that I could not hope that he would respond to me if I refused to respond to him.

Q. Well, was it to keep the exchange going?

A. No, sir. There was no exchange. There was no agreement.

Q. Did you expect him to respond to your inquiries if you did not respond to his?

A. I could not hope that he would respond to mine if I did not respond to his. And, as I just said, that was one of the reasons that I had for responding.

Q. And did you say that these conversations occurred over a period of from 1959 to 1962, in which you participated?

A. Yes, sir.

Q. Were there any other business reasons for you responding to the inquiries from your competitors?

A. I would think that those would have been the principal reasons.

Q. Mr. Bear, have you ever stated that one of the [1484] reasons you responded to a competitor's inquiry was that you did not want him to guess at the price and possibly undercut you, U. S. Gypsum, in the marketplace?

A. Well, I very well may have stated that as a corollary reason, but the fact that I told him what our price was still left him to make his own decision, whether he met our price, didn't meet it, or undercut it.

Q. Mr. Bear, did you ever testify under oath in response to the following question:

> Question: "Now, what business reason did you for U. S. Gypsum have for responding to the requests by your competitors?
>
> Answer: "Well, they were entirely selfish. In the first place, if in fact for whatever reason we were selling a given dealer in a given town, usually for a specific job at

a price lower than our bulletin, published bulletin, price, I felt it was to our advantage to confirm that price rather than let the competitor guess at what price we might have been selling and thereby possibly undercutting the price which, in fact, we were selling this customer at."

Do you recall that testimony?

A. Yes, I do, and I have said nothing that I am aware of that is contradictory to that testimony here.

Q. And was that testimony true?

[1485] A. Yes, sir.

Q. And I go on, in your answer, quoting:

Answer: "Secondly—well, the obvious purpose there was to avoid us chasing ourselves in the case that the competitor undercut us below the price at which we were in fact selling him."

Was that also your testimony on a prior occasion?

A. I believe it was.

Q. And was that testimony true?

A. As far as—I still feel it's true; yes, sir. But I still repeat that while I might hope that he would not undercut us, there is nothing that would prevent him from selling at whatever price he might want to sell the same or way below us or a little below us or refuse to meet it. There is nothing in my answer that required him to take any specific action other than independent of ours.

• • • • •

[1488] Q. But you also testified that if you did not give the information you state, you could not state or hope to get it yourself, is that correct?

A. That is correct.

• • • • •

[1490] Q. Now, Mr. Bear, when U.S. Gypsum took action, pricing action, made a decision as a result of the information you received from your competitors, would the price offered to that customer end up being the same as the price offered by the competitor?

A. I think I understand your question, and that is if we elected to meet a reported competitive price, and if the competitor confirmed it, and if we then—the price then we would authorize our field sales people would be the price to meet the competitive offer.

Q. And by meeting the competitive offer, does that mean to be the same as the competitive offer?

A. Yes, sir.

I understood, again from counsel, and the Robinson-Patman that we could do so.

Q. And you sought this information from the competitor to help you make a business decision regarding price which [1491] would make your price the same as his, is that not correct?

A. For legal reasons, sir, and also to avoid——

The COURT. How about just answering the question and leaving it up to your counsel to argue the facts.

The WITNESS. OK.

Yes, sir.

By Mr. THORSON:

Q. And concerning the conversation around the other way, the competitor sought information from you, which you, for U.S. Gypsum, willingly gave to help him make a decision to offer price which would be the same as U.S. Gypsum's in the market, is that not true?

A. That was one of the reasons.

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[1492] Q. I believe you testified that these conversations occurred relatively infrequently, is that correct?

A. Yes, sir.

Q. How frequently or how often did they occur?

A. It is my recollection that it was really—there was really two years in—I think that are under question, 1960 and '61 that are applicable. It is my recollection that in 1960 there were very few inquiries that I made and inquiries that I received, relatively. I mean, I go weeks without receiving or making an inquiry. Some weeks I might receive or make one or two or three calls.

Conversely, in 1962, and refreshing myself in this area, there were more calls by two to one, some figure of that nature.

There could have been—I could have gone several weeks without making or receiving a call. I could have made [1493] four or five or six calls, as many as that per week.

Now, again, all of these calls made and received were not necessarily gypsum board. They could have been with respect to gypsum plaster or partition tile. They could have been with respect to some non-gypsum products or they could have been for other—well, we are talking about those having to do with inquiries, so that is it.

Q. And, of course, gypsum board was by far your most important product at that time, was it not?

A. That is right, that is right, but these other commodities were not insignificant.

Q. And you say these calls occurred with a frequency sometimes as great as six a week, is that correct?

A. Well, that is a guess. Now I can—I have got another approach on that in refreshing my memory on this subject. I know, for instance, in 1960 that we approved 101 price exceptions on gypsum products in the gypsum company and of those 101, I am going to guess that 25–30 per cent were other than onboard products. They were in plaster, gypsum partition tile, what have you. The remaining 70–75, whatever, we would have occasion to make competitive inquiry only on a fraction of those, and by fraction I mean I am talking about 5 per cent or so.

Sure, we made some calls with respect to situations on which we did not make a price adjustment, but even so, we [1494] get down to a figure there that is really pretty small in comparison with the hundreds of thousands of transactions and with respect to the 101 price adjustments that we made in 1960.

Now in 1961, it is my recollection there is about 250-odd or plus price adjustments and you had a little different situation. But, again, we were just talking about a handful of calls relative to the total.

Q. Mr. Bear, did any of these discussions take place on or about the time of price changes?

A. Not to my recollection, sir.

I want to qualify that to one extent. At the time, or subsequent to price changes, after they had been announced, and usually from the effective date there—well, between the time the price change was announced and from then on we would occasionally get reports of so-called price protection being offered on the part of a competitor which we were asked to

meet, and we covered that this morning, that area. And to the extent that price protection became a competitive problem, subsequent to the announcement of price increases, why there were probably more calls at such periods. But, again, in the timeframe gypsum board was not—well, it was a factor on some jobs, but it wasn't in the broad usage on commercial jobs that it is today, or I understand it is.

• • • • •

[1496] Q. Who were the competitors that you had these conversations with?

A. Well, again, let's—as long as you understand what I mean by conversation, and that they are a simple question and a simple answer, in the great majority of the cases, do you want to go down the list or do you want me to go down the list?

Q. If you need help I would be happy to assist you.

The COURT. Who was all of them, all of your competitors on various occasions?

The WITNESS. No, no, sir. No, Your Honor.

I may need some help, but I can name most of them, I think.

With National Gypsum it was Mr. John Brown.

[1497] With Bestwall it was Mr. A. L. Meyer. I may have had—I don't recall specifically—very rare occasions, occasions to talk to Mr. Malcolm, president of Bestwall, but my best recollection is those did not involve gypsum products.

With Flintkote it was Mr. O. H. Story, who is no longer living, I believe.

With Celotex it was Mr. Dan Brown, who is no longer living, Don Miller, did I say?

Mr. KECK. Could I have the witness's answer read? I think there is some confusion here.

The COURT. Read?

Mr. KECK. There are two names mentioned——

The COURT. You mean you want the whole thing read?

Mr. KECK. This last answer, the very last part.

The COURT. Just read the last part.

[Last part of answer read.]

The WITNESS. I am sorry, Mr. Don Miller. Let me correct that, please. Mr. Malcolm Meyer, it was Malcolm Meyer, not Mr. Malcolm.

One other with respect to Kaiser I, very, on very few occasions called and received calls from Mr. Jim Hague. I don't think, although again, as was the case with one or two [1498] others here, I don't recall I had any, made any inquiries with respect to price or received any from either Mr. Costa or Mr. Harper of Kaiser.

I believe that—that is the total, unless you want to refresh my memory, Mr. Thorson, with respect to others.

[1499] By Mr. THORSON:

Q. Mr. Bear, did you on a previous occasion testify that to your recolection you may have had such conversations with Mr. Greenwood of Celotex?

A. It is my recollection I may have. I may have, but it is my recollection those discussions, if any, with Mr. Greenwood related tc either non-gypsum products or Gypsum Association matters.

Q. How about Mr. Harper of Kaiser?

A. I answer that. I don't recall specifically Mr. Harper or Mr. Costa.

Q. Of these persons that you have mentioned, with whom did you have most of these conversations? Who did you have more with than with others?

A. With Mr. John Brown of National.

Q. Is that because National was your biggest competitor?

A. We crossed swords with them at more different points.

Q. Who, to your recollection, did you have the fewest or least such conversations?

A. It would be pretty hard to say, sir, as between Kaiser, Flintkote, Celotex. I'd say third was probably Mr. A. L. Meyer of Bestwall.

Q. Were there any competitor companies that you attempted to ascertain this information from but just plain [1500] refused to engage in that practice?

A. I have no recollection of having called any of the other companies or received calls from them.

Q. Did you ever refuse or turn down any competitor who made such inquiries of U.S. Gypsum?

A. Are you talking about competitors other than those whose names I mentioned?

Q. Yes.

A. No, sir.

Q. How did you know whom to call at these various companies?

A. I can only presume that they were identified to me by one of my superiors at the time, Mr. Frank Sadler. Or that someone such as Mr. Malcolm Meyer—whom I probably met before Mr. A. L. Meyer—might have identified Mr. A. L. Meyer to me. I really don't remember.

Q. Did these conversations begin at or about the time that you began attending Gypsum Association meetings as a representative of U.S. Gypsum?

A. Well, the Gypsum Association meetings didn't have anything to do with it, sir. As I recall it specifically, I had received this appointment in May of 1969—No, '59. I lost ten years. And I didn't attend a Gypsum Association meeting until, I believe, the following October, and I'd be sure that I must have made a few calls in the interim.

[1501] Q. So is it your testimony that you began making these calls prior to your participation as a representative of U.S.G. at the Gypsum Association?

A. That is correct.

Q. And would that be true with respect to each of the companies, each of the competitors that you had these conversations with?

A. That's the best of my recollection. Now I can't sit here and tell you for a fact that I called Mr. Hague of Kaiser before October, 1959. I just don't remember. I have no way of recalling. I mean just to cite an individual.

• • • • •

[1504]

By Mr. THORSON:

Q. Mr. Bear, the last question that I had asked you before the recess was whether the exchange of pricing information that you had with your competitors had a tendency towards making U.S. Gypsum's prices the same as its competitors; and, in your answer, you related your view as to whether it had a tendency to stabilize the market price.

Could I get a yes or no answer as to whether it did have a tendency to make the prices the same?

A. In my opinion, no, sir.

Q. Did it have any tendency to make them different from your competitors?

A. No, sir, probably not.

Q. Did it have a tendency one way or the other to make them the same or different?

A. Probably not.

Q. If you could not gain access to this information about your competitor's pricing, would your prices have a tendency to be more different from your competitor's?

A. That is conjectural.

Q. Did you not state that one of your reasons for responding was to avoid having your competitor guess at the market and possibly undercut you?

Mr. BARTLIT. Your Honor, I haven't objected. This is at least the third time this specific [1505] question has been answered, and I think we ought to get on with it, and I very respectfully object.

The COURT. Now, you will answer that once more, and I don't want to hear that question asked again.

The WITNESS. Please repeat it.

[Question read by Reporter.]

The COURT. You mean, after all the times you heard it, you can't remember it?

The WITNESS. I have heard several repeated, Your Honor.

The COURT. You answer that, yes or no.

The WITNESS. Yes, sir.

By Mr. THORSON:

Q. And if your competitor guessed and undercut you, would that not have a tendency to make your prices different?

A. It could.

Q. Would it?

A. It could. We might have another opportunity to meet the competitive price.

Q. But, at least for some point of time in the market, it would have a tendency to make the prices different?

A. One price, to one dealer, for one job or one shipment, sir.

[1506] The COURT. Now, I am going to permit questioning as

to what happened, but those kinds of things are matters that should be saved for your argument to the jury. Those are not proper questions to direct to a witness. So let's ask questions about what happened.

* * * * *

[1508]

Q. When you made those calls, Mr. Bear, did you keep any record of the call?

A. No, I did not.

* * * * *

Q. If your reason in making the call was to comply [1509] with the Robinson-Patman Act and have a good faith meeting of competition, would it not have been to your advantage to make a record of that good faith effort to ascertain that competition?

Mr. BARTLIT. Your Honor, this is another one of these argumentative type questions, based upon circumstances that aren't in the record. It isn't a factual question. I object.

The COURT. Overruled.

Mr. THORSON. What was the question, now, sir?

[Question read by Reporter.]

The WITNESS. I did not feel that it was, Mr. Thorson, simply because the inquiry and the answer thereto was one of a number of factors leading to a decision, others of which were also not recorded.

We didn't attempt to record every facet or every consideration that went into a decision whether or not to meet a competitive price.

By Mr. THORSON:

Q. Did you record the information that you received from your field sales organization?

A. That was recorded by the field sales organization, not by me.

Q. Well, was that recorded information sent to [1510] headquarters?

A. Yes, sir.

Q. In what form?

A. In the form of what we called a green sheet, which was a report of an alleged competitive price or policy which was dif-

ferent from our own published price or policy.

Mr. THORSON. Mr. Grainer, could I ask that GX 1554 be given the witness?

[Exhibit was handed to witness.]

By Mr. THORSON:

Q. Mr. Bear, do you have GX 1554 before you?

A. Yes, sir.

Q. Is that one of the green sheets you referred to?

A. Yes, sir.

Q. Could you hold it up so the jury can see what it looks like?

That is a standard printed form used by U. S. Gypsum?

A. Yes, sir.

Q. Did it have a number of squares and blocks for inserting data and information?

A. Yes, sir.

• • • • •

[1511] Q. Now, is the green sheet that you have before you, GX 1554, typical of the type of competitive report that you had at headquarters in Chicago when you were considering a request for a price adjustment?

• • • • •

[1513] Q. And was this the type of form that you had in your possession when you made the calls to your competitors?

A. Yes, sir.

Q. Now on the green sheets generally, not necessarily this particular one, was information recorded as to the reported competitive price from the marketplace?

A. The price to the specific dealer, yes. And if I may, please, interject, I very seldom made a call—in fact, I think I can truthfully say I never made call to a competitor with just this form. This form was used to report any deviations from our published prices and policies. The only time that I made a call to a competitor was when this form and supplementary information, usually in the form of memos and sometimes conversations with our sales management, were accompanied by a request to meet the competitive allegation or the allegation of the competitive price, which we have called a price adjustment or pink sheet, as opposed to this green sheet.

Q. Did the pink sheet follow the green sheet?

A. Yes, sir.

Q. In point of time?

[1514] A. It might have accompanied the green sheet.

• • • • •

[1515] Q. Referring to the form of the green sheet, not the entries made in this particular one, but does not the form have spaces so that the person filling it out can provide proof of the reported competitive offer?

A. He can, if he is able to obtain it.

Q. Does not the form—is not the form expressly designed so that the proof can be indicated right on the green sheet?

A. To the extent that it is available in the field, yes, sir.

Q. And is there not a specific section in the form with blanks and lines to provide for that very thing?

A. There are blanks and lines there to provide for various evidence as may be available in the field, and which is supposed to accompany the green sheet, to the extent that it can be secured.

Q. In the event that you called the competitor to find out whether the reported price was true or not, would it not have been an easy matter to indicate on the green sheet that the competitor had indicated either yes or no as to your answer?

A. It could have been done, Mr. Thorson.

[1516] Q. Was it done?

A. No, it was not.

Q. Why not?

A. Because we didn't think it was necessary or essential, along with other considerations that are given to the question as to whether or not we approve it. After all, the action—the action instrument was the pink sheet or a price adjustment, not the green sheet.

Q. On the action instrument, the pink sheet, was there any blanks in which entry could be made for information obtained for a competitior?

A. Not to my recollection. I don't have one in front of me.

Q. Would it not have been a simple process for you to have indicated the result of your telephone conservation on the pink sheet?

A. It could have been done.

• • • • •

[1536] Q. Well, you say you discussed it with your lawyers [1537] and your superiors; did you not?

A. Discussed what, Mr. Thorson?

Q. The fact of these telephone conversations with your competitors.

A. I was counseled both by my superiors and my attorneys as to what I might properly do, what I might properly say, how I might properly respond.

Q. Yes, but did you talk about this with anybody else within the company?

A. "Talk about it" are broad words. Mr. Morgan may have counseled me to make very sure that I understood the legal implications of this act, and that is about the only other individual that I think of that might have been a party to such a discussion.

Q. And during the time you were vice president for merchandising, did U.S. Gypsum have a written policy with respect to the permissibility of these conversations with competitors?

A. I do not recall that we did.

Q. Is it not true, Mr. Bear, that the written policy of U.S. Gypsum was precisely to the contrary during that period of time?

A. It depends on to whom that policy was applicable, Mr. Thorson.

Mr. THORSON. Now, Mr. Grainer, could [1538] I ask that GX 22 be handed to the witness?

[The requested exhibit is given to the witness by Mr. Grainer.]

The COURT. Counsel, please be careful. You are speaking too loudly, that I can hear what you are saying here.

Mr. FRICANO. I respectfully apologize, Your Honor.

The WITNESS: Yes, sir.

By Mr. THORSON:

Q. Can you identify what it is?

A. Yes, sir.

Q. What is it?

A. It is a treatise entitled, "The Legal Aspects of Selling," revised in 1960. It is, as I recall it, an update and an amplification of similar treatises that have been prepared with the help of legal counsel for dissemination to our field selling organization.

Q. And was this prepared and distributed within U.S. Gypsum?

A. It was to our field selling organization, and I am sure that those of us in merchandising had copies of it and were familiar with it.

[1539] By Mr. THORSON:

Q. Have you had occasion to review this document recently?

A. Yes, sir.

Q. When?

A. In preparation for this testimony.

Q. Where?

A. I don't remember whether it was here or in Chicago, sir.

Q. How long ago?

A. A couple of weeks—within the last two weeks, I would think.

Q. Who made it available to you?

A. Mr. Keck.

Mr. THORSON. Your Honor, I offer in evidence GX 22.

Mr. KECK. No objection, Your Honor.

The COURT. It is admitted.

[Government Exhibit No. 22 was received in evidence.]

By Mr. THORSON:

Q. Refer, if you would, Mr. Bear, to page number XII-11.

A. Yes, sir.

Q. Does the document at that point make any reference [1540] as to where information regarding reported competitive prices could be obtained?

Refer, if you would, to the last paragraph on the page.

A. Oh, right.

Do you wish me to read the applicable sentence in response to your question, or do you want to read it?

Q. Perhaps I will read it.

I will read the last two sentences of that paragraph.

Mr. KECK. Your Honor, may I ask that he read the entire paragraph?

Mr. THORSON. I would be happy to, Your Honor.

The COURT. Read it.

Mr. THORSON. The paragraph reads, "It is a defense to a violation of the Act.—"

By Mr. THORSON:

Q. I assume this refers to the Robinson-Patman Act, does it, Mr. Bear?

A. That is my understanding.

Mr. THORSON: —"That the seller makes a lower price or furnishes services or facilities in good faith to meet an equally low price of a competitor or services for facilities furnished by a competitor. This permits the seller to meet in whole or in part, but not to beat, an actual [1541] competitor's equally low price without having to extend that price to all other competing customers. Thus, it is permissible for a company to meet competitive situations as to price, policy, service, terms and conditions of sale either wholly or in part. The facts justify such a meeting of competitive situations necessarily can only be obtained in the field from the trade. Pertinent facts should be recorded on appropriate forms for future reference."

By Mr. THORSON:

Q. Is that part of the written policy of U.S. Gypsum at that time?

A. It was with respect to the field selling organization, yes, sir.

Q. You are saying that or are you suggesting that the policy for the field sales organization as to what is permissible and what is not did not apply to you back at the headquarters office?

A. That is a very definite fact, yes, sir.

Q. And when it states that pertinent facts should be recorded on appropriate form for future reference, are the forms referred to the green sheets?

A. They could be.

Q. Well, is it your best recollection that they were the appropriate form in existence at that time?

A. That is my recollection.

[1542] Q. To your knowledge, Mr. Bear, did U.S. Gypsum have any other written policy in effect at that time that covered your situation?

A. I don't recall that we had anything formalized.

Q. Did U.S. Gypsum ever have any such thing formalized in writing?

A. It is my recollection at some time in February, 1962, counsel was requested to develop a form that was more applicable to the merchandising people, the people in charge of planning and policy.

This document, as I repeat, was directed to the field selling organization who had no responsibility whatever for policy or planning.

Q. So in February, 1962, at about the time you were leaving that job a new written policy was directed toward the office that you held, is that correct?

A. Well, the office that I held and other people in a management capacity.

Q. And was this new written policy drawn in such terms that it conformed with the prior practice that you had engaged in?

A. Yes, it was generally consistent, as I recall it.

• • • • •

[1552] • • • Q. Would you refer to GX-2401, which is in evidence, and I believe is to your right on the counter there?

A. Yes.

Q. Can you tell from examination of that document, which is the Gypsum Association minutes for its October, 1960 meeting, when American Gypsum applied for membership in the Association?

A. There is a paragraph here that refers to the [1553] application, yes, sir.

Q. Does that refresh your recollection as to when the company applied?

A. I accept these minutes as being accurate, sir.

Q. Do you know whether any action was taken on the application at that time?

A. I wouldn't know without reading the balance of the minutes.

Q. Would you please refer to GX-2429, which is also to your right hand there? GX-2429, which is in evidence, is a minute of the Board of Directors meeting for October, 1960, is it not?

A. Yes, sir.

Q. Would you examine that document to see whether any action was taken on American Gypsum's application?

A. I see both Mr. Hardin and Mr. Quayle attended the Board of Directors meeting and I see that it was acted on favorably by the Board of Directors of the Association.

Q. Referring back to GX-2401, the minute of the Membership meeting, had Mr. Hardin and Mr. Quayle been invited to attend that meeting, although they were not members?

A. The minutes indicate that the secretary had extended an invitation to them.

Q. Now, Mr. Bear, did you ever receive any calls from American Gypsum inquiring about U.S. Gypsum's prices?

[1554] A. Not to my recollection, sir, no, sir.

Q. Did you, or to your knowledge, did anyone else in U.S. Gypsum ever call American Gypsum to inquire about a price that American Gypsum had?

A. Not to my recollection.

Q. Is there any reason why there was no such calls between U.S. Gypsum and American Gypsum?

A. No reason I am aware of, except I presume there was no purpose for me to make such calls.

Q. Did you ever talk about prices with anyone from American Gypsum?

A. I quoted prices on certain commodities, certain gypsum and accessory products and board paper to Mr. Quayle during the course of a visit that I referred to, that he made to our office sometime shortly after he joined American, which I believe was in the summer of 1960, in response to his request for such prices. That was a buy and sell discussion.

Q. A buy and sell discussion?

A. Yes, sir. And it also involved, I believe, his request or inquiry as to whether we would be willing to license him to manufacture a couple of our patented products.

Q. In the buy and sell discussion, was any reference made to f.o.b. mill prices for gypsum board?

A. There was to the products that he asked us whether we would be willing to sell him, yes, sir.

[1555] Q. And what was said with respect to f.o.b. mill prices?

A. Well, I quoted him, as I told you, prices on certain specialty products that he did not plan to manufacture and told him that we would be glad to consider selling them to him, if he wished to buy from us.

Q. Did you show him anything with respect to prices at that time?

A. I pulled out my bulletin books to refer to the prices that I quoted him.

Q. And did these bulletin books also include the prices for non-specialty items, in other words, the regular items, gypsum board?

A. Yes, sir.

Q. And did you show them to him, too?

A. Not in the sense of showing them to read. He might have looked over my shoulder. He might have read upside down and seen that the prices were there.

Q. Did you give him any copies?

A. No, sir.

Q. Did you afford him an opportunity to make any copies?

A. No, sir.

Q. Did he ask you for any copies?

A. No, sir.

[1556] Q. Did he write anything down?

A. No, sir, not to my recollection.

I do recall telling him, and I believe I subsequently confirmed in writing to him, the prices that I quoted him on the particular products about which he inquired.

Q. Were these prices that you were proposing to sell to him, or were they prices at which U. S. Gypsum offered the products for sale in the market?

A. They were prices that we proposed to sell him, and they were based on our f.o.b. mill prices at our nearest mill, which, as I recall, was Sweetwater, Texas, less a manufacturer's discount, plus freight to his plant in Albuquerque.

Q. Did American Gypsum buy any products from U. S. Gypsum?

A. It is my recollection that they did buy some products.

Q. For resale?

A. I can't answer that specifically. It is my recollection that they did three things, as I recall it. They bought some board paper from us, which was handled by another department, but it was a matter that Mr. Quayle then inquired of me about, and I put him in touch with the department that handled that. I also recall that he took out a patent license—we executed a license agreement with [1557] him—with respect to a water-

proof type of gypsum sheathing; and I believe he bought some modest quantity of a finished product. I don't recall the exact items or quantities.

Q. Well, do you know whether he bought it for his own use or for resale to the trade?

A. Well, if he bought finished products, sir, he would, I believe—of course, I don't know what use he put to them. I presume he bought them for resale.

Q. And do you know what price he offered them for resale to the trade?

A. No, I don't, sir.

• • • • •

CROSS EXAMINATION

[1618] * * * Q. Yesterday the Court asked you how companies could sell, and I quote, "Every once in a while to somebody at less than the price that they were willing to sell to everybody else". Do you recall that question?

A. Yes, sir.

[1619] Q. Consistent with the Robinson-Patman Act, do you know how consistent with the Robinson-Patman Act your competitor from time to time could sell for less to a particular customer and thereby create a competitive situation that you had to face?

A. Yes, sir.

Q. Can you describe what those bases are?

A. I would think that the principal circumstances might involve a smaller competitor, not necessarily a one plant competitor, but a smaller competitor who didn't have the scope of distribution that we might have, who was selling only one dealer in a given market area. So, if that particular competitor got hungry for a given job, he could legally sell that dealer at any price he wanted to, without violating the Robinson-Patman Act, so far as I know, and thereby create a situation that in turn might create a problem for us.

[1620] Q. Were there other exceptions to the Robinson-Patman Act, excepting the good faith meeting proviso, to your knowledge?

A. It is my recollection that—let's see—there was one other, at least, and that was—well, we have talked about non-competing dealers. There were—a certain manufacturer

might justifiably be able to reduce his price by reason of a cost advantage.

For instance, he might be in a certain trucking zone and ship his material by trucks, and he might be able to get a return load, rather than having his trucks deadhead back empty, and, thereby, reduce his costs to deliver material to a dealer.

Q. Pass on that saving to the customer, consistent with the Robinson-Patman Act?

A. That is my understanding, sir.

Q. Did you also run into this same problem in states where your competitor had a plant in that state, where it was an intrastate shipment?

Did Texas Gypsum present that kind of a problem?

A. Texas Gypsum did present that type of a problem, certainly, in shipments into Texas.

Q. How is it that, when you had a lower price, that was the subject of a verification call to you, that you were able to ever answer yes without violating the Robinson- [1621] Patman Act.

A. Well, there are two reasons that I can think of, or maybe three.

I think that the first was in the case we were meeting a second competitor, and that was the usual case. I don't recall of any instances wherein we may have quoted a lower price simply by reason of a lower cost, at least on gypsum board products, and I do not recall instances—although I can't say for a fact that they didn't exist—where we sold a dealer in intrastate situations.

Q. You said, this morning, didn't you, that in meeting Texas Gypsum in El Paso you shipped from Sweetwater, Texas?

A. That's correct.

Q. Would that be an intrastate shipment?

A. Yes, sir.

Q. Was that subject to Robinson-Patman Act?

A. It is my understanding that it was not.

• • • • •

[1622] Mr. Keck: Well, if there is any question about that, I'll ask the witness what verification means to him.

The COURT. All right.

The WITNESS. Well, my understanding of the word, in the context that you are talking about, consisted in my making an isolated inquiry of a specific competitor concerning whether it was true that he was quoting a stated price to a stated customer, which price was below our regular published price.

By Mr. KECK:

Q. These contacts or phone calls that Mr. Thorson asked you about yesterday, where you made a call, occasionally, or where you got a call, occasionally—were those known as verification calls?

A. I think that—well, that's an appellation that has been attached to them; yes, sir.

Q. All right. You were asked about the verification calls yesterday at some length, and I want to ask you these [1623] questions about those calls.

What products were you concerned with, as vice president for merchandising?

A. All the products the company made.

Q. Well, were your verification calls limited only to gypsum board products?

A. No, sir; they were not.

Q. When you testified yesterday about the various aspects of your infrequent verification calls and those you received from competitors, were you talking only about calls relating only to gypsum board?

A. I tried to point out that many of the calls—I don't know how clearly I pointed it out—were made with respect to products other than gypsum board. They could have been gypsum plaster or partition tile. They could have been non-gypsum products. And, of course, there were a few calls made, from time to time, that had nothing to do with price matters.

Q. Can you identify in any way the calls you referred to yesterday and this morning that related only to gypsum board?

A. No, I could not, sir.

Q. When you related that you talked to particular individuals like Mr. John Brown and Mr. Hague and Mr. Don Miller, were you talking just about gypsum board products, or [1624] were talking about other products, possibly, or verifying a price on other products?

A. The answer to that question would vary by company, Mr. Keck. Certainly, in the case of Mr. John Brown of National Gypsum and Mr. Hague of Kaiser, they could have referred to other than gypsum products.

It is my recollection, with respect to Mr. Don Miller of Celotex, that his responsibilities included only gypsum products, but, again, they could have extended to products other than gypsum board.

Q. Such as what?

A. Plaster.

Q. You testified, I believe, yesterday, that you made perhaps, more calls to Mr. John Brown than to any of the other gentlemen you identified. Do you recall that?

A. Yes, sir.

Q. Were all of your calls to Mr. Brown, for example, or from Mr. Brown, concerned only with gypsum board?

A. No, sir.

Q. Did his company make a variety of non-gypsum products?

A. Yes, sir.

Q. And that same thing is true of Kaiser?

A. Yes, sir.

• • • • •

[1625] Q. Yesterday, you were asked certain questions regarding verification and how it might or might not [1626] stabilize price. Do you recall that?

A. Yes, sir.

Q. Isn't it a fact that, by verifying with your competitors, you were able to cut the price?

A. Yes, sir.

Q. Isn't it true that you could not have cut the price in some instances without such verification?

A. We could not have, legally.

Q. Yesterday, you were asked whether you kept any record of the verification calls—indeed, this morning, also—calls you made, and answered that you did not receive—and you testified you did not receive, "any instructions not to keep a record of such calls."

Do you recall that?

A. Yes, sir.

Q. You also testified that you had received instructions, from time to time, from legal counsel about such calls. Do you recall that?

A. Yes, sir.

Q. Did legal counsel ever advise you to keep any record of verification calls?

A. They did not, sir.

• • • • •

[1628] Q. Mr. Bear, yesterday in questions you mentioned that you did not attempt to record every facet or consideration that went into a decision whether or not to meet a competitive price. Do you recall that testimony?

A. Yes, sir.

Q. Can you tell us what some of the other factors were that were also not recorded?

A. Well, they involved largely matters that we considered in headquarters office as a part and parcel of the consideration as to whether or not to approve a given price request that was detrimental in nature in their opinion, were our prerogative and not those of the field selling organization.

They included such factors as general consideration of the situation, the overall feel for what was involved, the voracity of the dealer, who was making the report, the likelihood of our ability to get the order even though we did meet the alleged price, the impact of meeting that price on competitive dealers in the market. That is, dealers that were in competition with the dealer to whom we were being asked to extend a reduced price.

[1629] The impact on the market with the possible impact on the level of prices in the entire market and contiguous markets should we take such action. The capacity utilization of our plant or plants which might serve this area. And, the profitability to us of the order of the requested price.

I believe those covered most of the judgment mental factors, as I say, that we considered in addition to what was on the green sheet and what answer we might or might not get from a competitor should we inquire.

• • • • •

[1633]

By Mr. KECK:

Q. Yesterday Mr. Thorson showed you G-22.

Mr. KECK. Mr. Grainer, I wonder if the witness might have G-22.

By Mr. KECK:

Q. What you testified was a treatise entitled Legal Aspects of Selling. You will recall that Mr. Thorson sought to infer——

Mr. THORSON. Objection as to the form of the question.

Mr. KECK. I have not finished it yet.

Mr. THORSON. He has gone far enough.

The COURT. He objects to your saying Mr. Thorson sought to infer and I think he is right.

Would you rephrase that?

Mr. KECK. Yes, sir.

By Mr. KECK:

Q. Yesterday Mr. Thorson showed you GX-22 and asked you questions concerning whether it wasn't U.S.G.'s written policy that verification was improper, verification contacts were improper. Do you recall that?

A. Yes, sir.

Q. Indeed, he at one point said—and you may recall this—, "Wasn't its written policy precisely to the [1634] contrary of your conduct?"

Do you recall that?

A. Yes, sir.

Q. You further testified that GX-22 was a thesis or dissemination to your field selling organization?

A. That is correct.

Q. And was applicable to your field selling organization.

Now the sentences that he particularly relied on were——

Mr. THORSON. Objection, Your Honor, to the form of the question. The question can be stated as the sentences to which I referred to in my question and I object to the inference of my reliance on a part of it in interrogating.

Mr. KECK. I will rephrase it.

The COURT. All right.

By Mr. KECK:

Q. Mr. Thorson made reference to two sentences appearing at the bottom of page 11 and I will read those to you.

Mr. THORSON. I object, Your Honor. When I requested to read those two sentences defense counsel insisted I read the

entire paragraph and I would like to make a similar request at this time.

The COURT. You mean you want the [1635] entire paragraph read again?

Mr. THORSON. Yes, Your Honor.

The COURT. Read it.

Mr. THORSON. "It is a defense to a violation of the Act that the seller makes a lower price or furnishes services or facilities in good faith to meet an equally low price of a competitor or services or facilities furnished by a competitor. This permits a seller to meet in whole or in part, but not to beat, an actual competitor's equally low price without having to extend that price to all other competing customers. Thus it is permissible for the company to meet competitive situations as to price, policy, service, terms and conditions of sale either wholly or in part. The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade. Pertinent facts should be recorded on appropriate forms for future reference."

By Mr. KECK:

Q. That is the reference to the use of green sheets?

A. Yes, sir.

Q. Was it not the company's consistent policy that the information on green sheets was to be obtained from the field?

A. Yes, sir.

Q. Haven't you so testified here?

[1636] A. Yes, sir.

Q. Was it not simply a way to insure that your 7 to 800 salesmen would not willy-nilly call competitors?

Mr. THORSON. Objected to as leading. It is how own witness on direct examination.

Mr. KECK. It is not my own witness.

The COURT. This is cross-examination.

Mr. THORSON. I couldn't tell when he switched from direct to cross-examination.

The COURT. This is cross.

Proceed.

Mr. KECK. May I clarify that? The only time I made him my witness had to do with Exhibit 6, the annual report.

By Mr. KECK:

Q. Will you answer the question?

A. What is the question?

[Question read.]

The WITNESS. Yes, sir.

By Mr. KECK:

Q. Was it a limitation on your responsibilities?

A. No, sir.

Q. Were you so advised by counsel?

A. Yes, sir.

Q. Did they not advise that only a very limited [1637] number of people should ever make verification calls?

A. Yes, sir.

Q. Did you not testify that you, and to a limited extent Mr. Sadler, made the only verification phone calls you can recall relating to gypsum board?

A. To the best of my knowledge and recollection, yes, sir.

Q. Was that pursuant to counsel's advice?

A. Yes, sir.

• • • • •

[1641] • • •

By Mr. KECK:

Q. • • • Yesterday, when you testified near the close, you recalled that sometimes in February, 1962, U.S.G. counsel was requested to develop a form of written policy that was more applicable to the merchandising people. Do you recall that?

A. Yes, sir.

[1642] Q. The people in charge of planning and policy, I think you said.

A. Yes, sir.

Q. Which was generally consistent with the prior practice and that you thought had come out over Mr. Morgan's name?

A. Correct.

Q. I show you what has been marked Defendant's Exhibit 63 and ask you if you can tell us what that is.

A. Well, this is a copy of the release by Mr. Morgan, which I acknowledged receipt of. It is dated February 13, 1962, and to which is attached a memorandum regarding relationships with competitors, prepared in cooperation with MacLeish, Spray, Price & Underwood.

• • • • •

[1643] Q. I call your attention to the first paragraph, Mr. Bear, which says: "Experiences of other companies in antitrust actions indicates a need for reiteration of the company's position with respect to our relationships with competitors."

In your experience, is that word, "reiteration," accurate and truthful in this context? Was this a reiteration?

A. Yes, sir.

Mr. KECK. Your Honor, I would like Mr. Hiering, my associate, to read this exhibit to the jury.

Mr. HIERING. The document bears the date February 13, 1962.

> "So that there can be no misunderstanding regarding the company's relationship with competitors, attached memorandum has been prepared to state our position. Please read this document carefully and indicate by signing below that you have read it, understand it, and will conform with it in every way.
>
> "Retain the memorandum and return this letter with signature to Department 150–A, Chicago."
>
> Signed, "Graham J. Morgan, President," and then there is an acknowledgment signature on the bottom, "H. C. Bear."

The attached document is titled, "Memorandum Regarding Relationships with Competitors, Prepared in Cooperation with MacLeish, Spray, Price and Underwood.

> [1644] Experiences of other companies in antitrust actions indicate a need for reiteration of the company's position with respect to our relationships with competitors.
>
> This company will not have nor countenance any agreements or understandings with any competitor or competitors regarding the prices at which, the terms, conditions, and circumstances under which, or how, or where, or to whom we will sell our products.
>
> Furthermore, we will not have any written or verbal communication with any competitor about future prices and selling policies. Even though communications with competitors with regard to future prices and selling policies are often not of an antitrust significance, nevertheless, it will be our policy not to have such communications because illegal conspiracies to fix prices or to agree upon terms and conditions of sale or other selling policies are often established from inferences drawn from the conduct of competitors.

> By refusing to have any written or verbal communication on such subjects, we will avoid the danger of inferences being drawn of illegal conduct. If we are asked by a competitor about our future prices and selling policies, we will refuse to answer the inquiry or even discuss the subject.
>
> What our company may do in initiating changes in [1645] our prices and selling policies or may do in the event competitors change their prices or selling policies is not to be a matter of verbal or written communications with any competitor, nor will we initiate any inquiry of any competitor regarding the future prices or selling policies of the competitor or even receive such information from a competitor.
>
> This does not mean that the company must operate in a vacuum or shun all contact with competitors. There are many occasions when correspondence or conversation with competitors is proper and entirely without antitrust significance.
>
> The company belongs to a number of trade associations concerned primarily with promotion of industry products. We expect to continue in the work of these trade associations. But it must be no part of a trade association program to discuss the future prices and selling policies of this company or of any competitor.
>
> We have always insisted that the meetings and the work of any trade association to which we belong be conducted under the guidance of a qualified lawyer, and, if we belong to any association that does not operate in that manner or, having operated in that manner, ceases to do so, we should withdraw from the association.
>
> In the normal course of our business, we have many relationships with competitors. For example, we sell [1646] products to many competitors. We also buy products from many competitors. We have patent licenses, and we have agreements regarding the exchange of mineral lands, easements and boundary lines.

Correspondence and conversations in connection with such matters have no antitrust significance, and we will, of course, continue such activities in the normal course of business.

There are occasions when the company must try to determine the competitive situation in a market or with a customer. Such occasions usually arise when there is reason to believe that a competitor has a lower price or more favorable terms and conditions of sale, and it is difficult to determine the facts, either because trade factors in the market or the particular customer will not reveal the situation, or there is reason to believe that the trade factors or customers are not being frank in what they tell us.

Under such circumstances, we are entitled to seek information any place we can get it, and it is proper to ask competitors what prices they have charged or are currently charging or what terms and conditions of sale they have offered or are currently offering. The competitor may refuse to answer or may even give an evasive or incorrect answer, but we are entitled to ask the question and to seek whatever information the competitor is willing to give. We will also answer similar inquiries from a competitor as to [1647] our prices and terms and conditions of sale in any market, to the extent we feel it is prudent to do so.

It is often advisable to answer such inquiries because, otherwise, the competitor may be misinformed as to our prices and policies, and answering the inquiry may avoid consequences unfavorable to the company.

It is inevitable that, as our employees go about the country in the normal course of their business, they will meet competitors, and often the conversation will turn to the business in which both are engaged. There is no legal reason why we should try to avoid such normal contacts or normal business talk which may produce information beneficial to the company; but it is important to avoid any conversation with competitors about our or their future prices and selling policies because such conversations, even though there is no attempt to or

thought of reaching any agreement or understanding, are often looked upon with suspicion, and our policy is to avoid the subject entirely."

By Mr. KECK:

Q. Mr. Bear, who was MacLeish, Spray, Price & Underwood?

A. Well, they were our legal counsel. This was the name of the firm, with which you are presently associated, at that time.

Q. Thank you.

You were asked a number of questions, yesterday and [1648] this morning, about price verification. Do you recall that?

A. Yes, sir.

Q. I wonder if you can tell us what are the basic reasons why, in the limited instances in which you made calls, you made price verification calls.

• • • • •

The WITNESS. The first reason was—and the basic reason—was to avoid liability under the Robinson-Patman Act requiring us to not discriminate in price between competing buyers, and, in order to avoid such discrimination, we had to assure ourselves that any price that we might quote a given buyer, lower than our regular published price, was made in good faith to meet the equally low price of a competitor.

By Mr. KECK:

Q. Would it be fair to epitomize or summarize that reason as compliance with the Robinson-Patman Act?

[1649] A. That is what legal counsel has advised me, sir.

Q. Were there any other reasons, Mr. Bear?

The WITNESS. I believe there is one other basic reason, Mr. Keck, and I believe that reason or that problem arose in some situations where a sharp buyer would attempt to play one manufacturer against another in order to obtain a lower price for himself. He very often—quite plainly, in our opinion—was lying to us. And we were advised by counsel that we were entitled to protect ourselves against the fraud or attempted fraud perpetrated on us by such a dealer through the medium of price verification.

[1650] By Mr. KECK:

Q. Well, then, could I summarize your second reason as protecting against fraud from the lying buyer?

A. Yes, sir.

Q. Were these the principal reasons for your price verification calls, or were there others?

A. Those were the principal ones, sir.

• • • • •

REDIRECT EXAMINATION

[1761] • • •

By Mr. THORSON:

Q. Mr. Bear, looking at Exhibit USG No. 23, is that one of the green sheet files from U.S. Gypsum?

A. Well, the only thing I identified yesterday——

Q. Well, can you answer the question yes or no, Mr. Bear? I asked you a question for a yes or no answer, and you make a speech. Can you just answer the question?

The COURT. All right. Don't make a speech, yourself.

Mr. DELONE. Your Honor——

The WITNESS. Will you please repeat the question?

The COURT. There are two gentlemen on their feet. What do you want?

Mr. MCSWEENEY. I object to the remarks of counsel.

The COURT. Well, I have already said—I have already commented on that, I think.

• • • • •

[1823] • • •

Mr. DELONE. If the Court please, there is another matter I would like to take up with Your Honor before that, because it concerns basically something that occurred during the testimony of Mr. Bear here this morning. Perhaps I could go first.

The COURT. Sure. Go ahead.

Mr. DELONE. And I want to start by saying, sir, apparently I evidenced some consternation at a ruling Your Honor made this morning.

The COURT. You did. And you appeared to be standing up, so I didn't want to go ahead without giving you a chance to say what you wanted to say.

Mr. DELONE. Well, I meant no disrespect to the Court, but I do want to return to that subject.

As I understand what Your Honor has now instructed the jury, you have told the jury that it can find that the verification calls which had been described by the witness, Mr. Bear, involved discussion of future prices, despite the fact that the

testimony—as I heard it—is clear that all that those telephone calls involved were discussions of past prices or past offers.

The COURT. Well, the jury isn't here. It appears to me that they all involved future prices and not past prices. That what was happening is, that one man would call the other man and say, "Did you charge that?"

That was past, that was a past price, but what was for the purpose of finding out whether he was going to meet it or not in the future.

Mr. DELONE. For the purpose the call involved and—as I understand the testimony and all the testimony in this record today—an inquiry from one about a past price.

The COURT. To determine what he was going to do himself in the future.

Mr. DELONE. The caller then took that into consideration in determining what he was going to do about a future price.

The COURT. And there was a course of conduct here over a period of time they were calling each [1825] other. Everybody that got such a call knew well it was his past price. The purpose of the call was for the other person to determine what his future price was going to be.

Mr. DELONE. But Your Honor's instruction, I think, went far beyond the theory that I understand you to be espousing now or your comment to the jury which said that they could . . .

The COURT. I haven't instructed them yet.

Mr. DELONE. . . . that they could decide that these calls involved discussions of future prices.

The COURT. It will be for them to decide. That's what I said and that's what I intended to say.

Mr. DELONE. I submit, sir, that on this record today—and that's all the jury has heard now—there is no basis for the suggestion that the jury could find that the conversations involved or concerned future prices.

The COURT. I understand your contention.

Mr. DELONE. And it would be mere speculation were the jury to so decide on the record that we now have.

The COURT. You will agree that that's [1826] what makes ball games, one person thinks one thing and somebody else thinks something different.

Mr. DeLone. Well, in addition, sir: Your Honor said, as I heard it, that the witness' testimony about what was involved in these calls was only his opinion, whereas he testified to what his pracetice was, and that it seemed to me unfairly centigraded.

The Court. He was being asked not what his practice was, but what his opinion was as to that practice. When he is asked—when a lay witness is asked a question: "Were you discussing past prices or future prices?" and with all the background that there had been concerning that subject, if there had been an objection I wouldn't have permitted the question. But there was no objection, and he did then say—he didn't talk of his practice, he gave an interpretation of what that practice was, which I think would have been more appropriate for the jury to do under proper instructions.

Mr. DeLone. I didn't so understand his testimony, sir. And it seemed to me, therefore, since he was the verifier who has been describing what he was doing, to say that that was opinion, was unfairly derogatory—if you will—of his testimony.

And, finally, I would like to call Your Honor's attention to the portion of our trial memorandum, pages 11 [1827] through 16, because it seems to me that what Your Honor has now said is an erroneous view of the law.

The Court. As to what?

Mr. DeLone. As to the effect of a telephone call to determine a past price in order that the caller may then decide with knowledge of the facts what he is going to do about whether or not to meet that price.

The Court. In the future?

Mr. DeLone. Yes. And I think the cases which we have cited, Judge Zirpoli's opinion and others, made clear under those circumstances that that cannot be treated as a discussion of future prices, which is the gist of Your Honor's comment to the jury as I heard it.

The Court. I have the highest respect and regard for the rulings of other federal district judges, but I don't necessarily agree with all of them.

Mr. DeLone. I merely want to point out I think Your Honor's ruling in that respect is a very fundamental problem in this case, as I am sure you realize. And therefore, as I see it—and others will have to speak for themselves—I

believe that the remark Your Honor made to the jury is highly prejudicial and I move for the granting of a mistrial.

The Court. Motion will be denied.

[1828] Mr. Fricano. May I make a remark? There has been a characterization here, and I would like to, for the record, just point out to the Court that the witness' testimony was not only with respect to a price that had been made already by his competitor, but also as to a continuing offer.

The Court. All right.

Now I suggest, too, that when counsel goes in on cross-examination into that kind of a subject to invite that kind of an opinion, the duty of the Court is not to sit as a vegetable and let that go as if this witness is deciding what the law is. I don't think those kind of questions ought to be asked the witness.

I don't think the witness ought to be asked legal definitions, and that's been happening, and I don't think that ought to happen. And when it does, I have to tell the jury that that's not the law as far as I can see it. I did tell them that they will have to take the law from me and not ask a layman on the stand, as has happened this morning. Counsel asked a lay witness legal, legal definitions, and when that is done, that leads to trouble.

I think whether that's future or past transaction was not a proper question to ask the witness. It was asked him, he gave an opinion I don't think he should have been asked to give. I don't criticize Mr. Bear, he was having [1829] the questions asked of him. But when he was asked that kind of a question, I think it was my duty to tell the jury that they will have to determine that and not the lay witness. And I suggest that a little more care be used in asking that kind of question.

Anything else?

Mr. Mellott. Yes, Your Honor.

With the Court's permission, I'd like to make one other motion.

This morning Mr. Fricano—and I believe properly—or Mr. Thorson, I am sorry. He made a request in the presence of the jury for the production of additional documents. I do not believe that that is a proper way to request the documents, Your Honor.

And, I believe it is highly prejudicial to the defendants, and particularly to my client, who wasn't even in the gypsum wallboard business at the time covered by the testimony of the witness who has been on the stand for as many days as he has, and I would therefore request that this Court direct that no similar requests be made in the future. Counsel for the Government knows how to properly request the documents and have done it on many occasions.

The COURT. So do counsel for the defense. They have done it, too, and it is bad practice. I don't want either side in the future to request documents [1830] of the other side in the presence of the jury. But it has been done by both sides and it isn't proper.

[1831] The COURT. All right.

Mr. MCSWEENEY. Your Honor, before you recall the jury, I believe the motion, Mr. DeLone's motion, would stand for all Defendants, unless they disaffirm. But I merely want to state that I am joining Mr. DeLone in his motion for a mistrial.

The COURT. There is no point to doing it. All you are saying is you agree that I was wrong, which is all right. But it inures to the benefit of everybody.

Mr. MCSWEENEY. Thank you.

• • • • •

[1840] RHYNE SIMPSON, JR., resumed the stand, and having been previously sworn, was examined and testified further as follows:

[1841] DIRECT EXAMINATION (CONTINUED)

By Mr. FRICANO:

Q. Mr. Simpson, you have identified yourself prior to the luncheon recess. I wonder if you could very briefly recapitulate your testimony concerning who you are, whom you work for, what your past employments were, various companies.

A. My name is Rhyne Simpson, Jr. I am presently employed in the land and timber business under the business name Simpson Land and Timber Company.

I, from 1961 through 1973 was an employee of Republic Gypsum Company which, in 1971, I believe, changed its name

to Republic Housing Corporation. Republic Gypsum Company continued to operate as a division of Republic Housing Corporation.

[1842] In 1968 I was elected president of Republic Gypsum and was president and chief executive officer at that time. I resigned in 1973.

Prior to that I had been employed by Avinger Lumber Company, which was a business owned by my father.

1959 through 1961, the business in Avinger Lumber was the manufacturing and sale of prefabricated houses and, in addition to that, the purchase and resale of wholesale building materials.

Q. Including gypsum wallboard?

A. Including gypsum wallboard, yes, sir.

Q. Is that all?

A. Well, I was for two years, 1962 through 1964, I was away from the business attending school.

Q. Where?

A. Havard Business School.

Q. Did you receive a degree from Harvard?

A. Yes, master's degree in business administration.

• • • • •

[1859] • • • Q. Now, by the way, as to that wallboard, is there [1860] any difference between the wallboard that is ultimately manufactured by Republic and the wallboard manufactured by U.S. Gypsum or Georgia-Pacific or Celotex or Flintkote or Kaiser, say, regular one-half-inch four by eight?

A. When you take the end tape off of the product, then it is very difficult to determine who made it. It is a commodity generic in nature.

Q. Would you explain what you mean by a commodity generic in nature?

A. Well, gypsum wallboard is like money. One dollar bill is like another one, and a piece of gypsum wallboard, unless you look at the code on the back or the end tape, it is difficult to tell who made it.

Q. Would it be comparable in quality, the different products of manufacturers, would it be comparable in quality?

A. Yes.

Q. Did the dealers buy from more than one manufacturer?

A. They would buy from more than one manufacturer.

Q. Now, what did you find when you traveled across the country?

A. Well, I talked to dealers, and they seemed to be very interested about the possibility of buying gypsum wallboard by truckload quantity without having to buy a carload.

[1861] Q. Did you learn anything else from your studies which led you to recommend that Republic Gypsum go into production of gypsum wallboard?

A. We did other studies. We hired a consultant that had had years of experience in the industry to attempt to determine our cost of manufacturing. We had some rough ideas. My father had looked into the industry for years, had been a purchaser of wallboard since the late thirties, I guess, and he had a fairly good feeling of what it would cost to manufacture half-inch gypsum board.

Q. Why, particularly, half-inch gypsum board?

A. Well, half-inch is—at least, at that time, it was, I would say, 80 percent of the sales. Five-eighths-inch, Type X, and Type X related or referring to the fireproofness of the product, has now a larger share of the market than it did then. Just like half-inch replaced three-eights-inch, and three-eights-inch replaced a quarter-inch. The product had gotten thicker over the years, and then the thicker product had had a larger share of the market. But half-inch was the bellwether product, you might say, and that was what you would always refer to when you would determine either the selling price or the cost of it.

And he had a fairly good idea of what it would cost to make, and we, in fact, did manufacture wallboards within the area that we had estimated we could when we put our [1862] feasibility study together. The consultant, for example, told us what we could expect. He gave us recommendations on what size plant we should build. The size of the plant is very important. If you don't get up to a certain size, then you got way too small a plant to stretch your fixed costs over, and your cost to manufacture is higher than it should be.

• • • • •

[1871] • • • Q. How old were you, Mr. Simpson, when you first encountered these executives at this meeting?

A. That was 1964. I was born in 1937. I would have been 27.

Q. Were you introduced to Mr. Watt?

A. Yes, I was.

Q. Were you introduced to everyone that was there?

A. Yes. I met everyone there over the course of the meeting.

Q. Did you have, at any time during the course of that meeting, a private conversation with Mr. Watt?

A. Yes, I did. It took place, I guess, the next to last day or, I think it was the banquet on the last night or the next to the last night, whenever it occurred, but I had a private conversation with him and he——

Q. What did he say?

A. He said there were certain things that went on in the gypsum industry. Specifically he talked about the exchange of price information and the need to be honest.

[1872] Q. Could you explain your answer? Did you understand it?

A. Well, I didn't understand it right off, no, sir.

Q. Did he say it in just that many words to you the first time?

A. It was a very short conversation. I can't say those were the exact words, but that was the gist of what was said to me.

Q. Did anyone else say anything to you in a private conversation at that particular meeting?

A. No, that was the only private conversation I had at that meeting.

Q. Did you then go back home after that?

A. Yes.

Q. Did you discuss Mr. Watt's conversation?

A. I discussed it with my brother and father.

Q. Did they understand what he meant?

Mr. McSweeney. Objection.

The Court. Sustained. You can say what you said to them.

Mr. McSweeney. I object to that.

The Court. Why?

Mr. McSweeney. It has nothing to do with any of us, what he told his father at home. It is hearsay.

The Court. It is hearsay what he said?

[1873] I will overrule. Go ahead.

By Mr. Fricano:

Q. What did you tell your father and your brother about your conversations with Mr. Watt?

A. I just related the conversation and tried to describe to them the best way I could, and what I had figured out that the conversations meant.

Q. Did you try to explain to your father and to your brother what the conversations meant?

A. Yes, the best I could. I really didn't know at that point what it meant. I had not participated and had not had anybody ask me a question, for example.

Q. All he told you was the practice was to exchange pricing information?

A. Yes.

Q. And that you had to be honest?

A. Yes.

Q. Did you ever get a telephone call subsequently?

A. Shortly after the meeting I got a telephone call from Mr. Brown of National Gypsum Company.

Q. Not Mr. Colon Brown sitting over there, but Mr. John Brown?

A. Yes.

Q. What did he tell you? Did you meet him at the meeting?

[1874] A. Yes.

Q. What did he tell you?

A. He didn't tell me anything. He asked me a question.

Q. What did he ask you?

A. He asked me if I had, if Republic had, offered a price to serve an account and I believe the account was in western Arkansas, and I know, because it is the first time it happened. I was—I was a little nervous and I said that I didn't know.

Q. Did he tell you, did he say anything else?

A. No, he just asked if I had offered a certain price and I said, "Just a minute. Let me go check and see."

I went then and put the telephone on hold and I think our sales manager was there. But I went back to the bookkeeping department to look at an invoice. We had sold the account, I believe, the week before, and I think that is what he was referring to. And I can't remember whether we sold it at the price he was asking about or we had sold it at a price that was higher than what he asked about, but I went back and said, you know, "Yes, we did," or, "No, we didn't," or whatever the case was.

Q. Did he say anything further to you at this time?

A. No. The only thing I remember was there was just an air of distrust perhaps in his voice, I know.

Mr. DeLone. I moved to strike that, sir.

[1875] Mr. McSweeney. If the Court please.

The Court. The jury will disregard the statement there was an air of distrust in his voice.

By Mr. Fricano:

Q. What did he say?

A. I put the telephone on hold and by mistake somebody else got on the telephone and he thought somebody was listening in.

Mr. DeLone. I move to strike what he thought.

The Court. Did he ask you about it?

The Witness. Yes, he did ask me about it.

By Mr. Fricano:

Q. What did he say?

A. He said, "Is someone listening in?"

I said, "No, sir, someone got on the telephone by mistake."

Q. Did he ask you anything about your honesty?

A. I can't put my finger on words, you know. He certainly didn't say, "You are lying to me," or anything like that, but it was just very careful and I had the feeling——

Mr. DeLone. Move to strike his feelings before he says them.

Mr. Fricano. If Your Honor please, I think they are extremely germane. This man was confronted by [1876] some mysterious statement by Mr. Watt.

The Court. Now wait a minute now.

We are going to take a recess anyway, so excuse the jury for ten minutes.

[Jury retired.]

Mr. BARTLIT. Your Honor, if I may make one quick statement, as the Court knows, I have been very careful not to make argument that could influence the jury, and I resent Mr. Fricano's statement in front of the jury about a mysterious statement by Mr. Watt and I think he ought to be instructed not to do that, Your Honor. That is not fair.

The COURT. No one should make argument to the jury at this stage of the game.

Now, Mr. Simpson, you understand what I am saying.

I don't want you to make those kinds of comments in the presence of the jury.

Mr. FRICANO. I understand.

[1882] • • • Q. Now, returning to your telephone conversation with Mr. John Brown. Did he explain to you any more fully what [1883] was meant by Mr. Watt's remarks at the Gypsum Association?

Mr. DELONE. Objected to as leading. He has already answered in full what the conversation was with Mr. Brown. Everything he recalled about it.

The COURT. Well, it isn't leading, so the objection will be overruled.

The WITNESS. The conversations that I participated in I limited to an exchange of information about a price that I had or had not established. Now I had——

By Mr. FRICANO:

Q. I don't think that's the answer to my question.

The COURT. Well, he said that's all he talked about, so that is an answer to your question more fully.

Mr. FRICANO. I am sorry, I apologize. I am sorry, sir, continue.

The WITNESS. Well, I had no conversation with Mr. John Brown per se about that, you know. The conversation was limited and I had many after that with him. Other than perhaps a

general—Not perhaps. A general comment about, "Be honest about what you say."

By Mr. FRICANO:

Q. All right.

Now, did it ever come about that you understood [1884] what Mr. Watt told you at that first meeting that you attended?

The COURT. That can be answered yes or no.

The WITNESS. Yes, I understood.

By Mr. FRICANO:

Q. What did you understand him to mean?

Mr. HIERING. Object as to what his understanding is, Your Honor.

The COURT. Well, you can tell us what Mr. Watt said to you. In other words, what the conversation was. But not your subjective interpretation as to what he meant.

The WITNESS. Mr. Watt said to me, "You will be asked questions. Be honest."

I understood that to mean——

Mr. HIERING. Object.

The COURT. You will be asked questions about what?

The WITNESS. Be asked questions about prices.

By Mr. FRICANO:

Q. By whom?

A. By competitors.

[1885] Q. And he said that this was an industry practice?

Mr. HIERING. Objection to leading, Your Honor.

Mr. FRICANO. I withdraw the question, Your Honor.

By Mr. FRICANO:

Q. Did he say——

Mr. MCSWEENEY. Objection.

Mr. BARTLIT. Leading, Your Honor.

Your Honor, this witness has, at least twice exhausted his recollection with Mr. Watt, and Mr. Fricano is attempting to lead him.

The COURT. He has only exhausted the first conversation, as I understand it, and you are now asking about subsequent conversations.

Mr. FRICANO. Yes.

The COURT. And you may tell us what he said to you in those subsequent conversations.

Mr. HIERING. Your Honor, can we have some foundation on these, as to a time and place, rather than just calling——

The COURT. On a phone call, who else was present?

Mr. HIERING. I don't know what conversation he is about to testify to now.

[1886] The COURT. Are you talking about a telephone conversation?

The WITNESS. I have talked about two conversations, so far.

The COURT. Was it on the telephone?

The WITNESS. The first was in person. No one else was present, besides me and Mr. Watt.

The COURT. And when you talked to him on the telephone——

The WITNESS. I talked to Mr. John Brown on the telephone, and there was no one else present. It was a telephone conversation between the two of us on a private line.

The COURT. All right.

By Mr. FRICANO:

Q. Was there anyone else in the room with you at that time?

A. I don't think so.

Q. Did you have subsequent telephone conversations with Mr. Watt on exchange of pricing information?

A. I exchanged price information with Mr. Watt on a subsequent basis; yes, sir.

Q. Did you do that over the telephone?

A. I did it on the telephone and in person, as well.

Q. Where did you do it in person? [1887]

A. At Gypsum Association meetings.

Q. Now, during that period of time, did you exchange pricing information with your competitors?

A. Well, from—the first time was that telephone call shortly after the first Gypsum Association meeting in October, 1964. Last time, I don't remember the exact date. It would have been some time in 1970 or '71.

Q. Now, how many meetings did you attend, if you know, between October of 1964 and—I will withdraw that question.

Did you ever terminate your association with the Gypsum Association?

A. I resigned as a director, officer of the association, and our company resigned as a member of the association, in 1970, I guess.

Q. Do you know how many meetings you attended between the time period that you first became a member and the time period when you resigned?

A. The association had two scheduled meetings a year, and I attended each of those meetings during that period of time, 1964 to 1970, so it would have been 12 meetings, at least, and perhaps another special meeting or two.

Q. Did you, at each of these occasions, with one or more of your competitors, exchange pricing information?

Mr. MCSWEENEY. Objection, Your Honor. [1888] He is attempting to elicit a conversation, and there is no proper foundation laid in a proper way to ask what was said, not the general descriptions over a broad period of time.

The COURT. The objection is overruled.

You may answer.

The WITNESS. Yes. I had many conversations with competitors about—talking about—exchanging prices. I was careful to limit my conversations to prices that had already been established or resolved or even referred to or thought of as after the fact price exchange.

By Mr. FRICANO:

Q. Was this done at Gypsum Association meetings, over this period of time?

A. Yes.

Q. With whom?

A. With nearly everybody in the industry that would have attended the meetings.

Q. Did you do it with Mr. Watt?

A. Yes. It was with United States Gypsum Company and, on most of my conversations in the early years, would have been with Mr. Gimlin, much fewer with Mr. Watt.

Q. Did you do it with Mr. John Brown?

A. Yes, I did.

Q. Of National Gypsum Company?

[1889] A. Yes.

Q. Did you do it with Mr. Kenneth Atwell of National Gypsum Company?

A. Yes.

Q. Did you do it with Mr. Marvin Greenwood, an official of Celotex?

A. Yes.

Q. Did you do it with Mr. Don Miller, an official of Celotex?

A. Yes.

Q. Do you recall whether or not you did it with anyone else at the meetings?

A. Yes.

Q. Who else?

A. Mr. Malhiot of Flintkote; perhaps, on occasion, on a few occasions, with Mr. Hague of Kaiser Gypsum Company. I am sure there were others. That is all I can think of right now.

Q. Anyone from Georgia-Pacific?

A. Yes, Mr. McKaskill of Georgia-Pacific; Mr. Burch, Gene Burch of Georgia-Pacific.

Q. Did you have such conversations over the telephone with these men whom you have just identified?

A. Yes.

Q. Did this concern the exchange—what did it concern?

[1890] Mr. McSweeney. I object to the question. There is no proper foundation.

The Court. You may answer the question.

The Witness. The telephone conversations were the same as the in-person conversations. They referred to either being asked about a given price or asking about a given price.

By Mr. Fricano:

Q. Were you ever asked about anything else, other than prices?

A. Yes.

Q. What?

A. Trucking practices.

Q. What was said and by whom?

A. Did we or did we not truck to a given market. At the time we came onstream, Mr. Huckleberry started trucking, and I guess we were the second to start trucking on a full scale basis, and there were a lot of areas that were not published as so-called trucking markets, and I was asked questions, did we or did we not truck into a given market.

Q. Can you recall who, among those whom you have named or others, as to who asked you these questions?

A. Well, there were questions—I can't remember specifics, but there were lots of discussions about trucking, [1891] because we initiated trucking in a lot of markets.

Q. Were your competitors, the Defendants in this case, trucking in those areas?

A. Some they were, and some they were not. When we initiated trucking into the state of Colorado, for example, there was no one else was offering truck delivery into Colorado. We were the first to do it.

Q. Did you receive any telephone calls on that?

A. I had a conversation with Mr. Greenwood of Celotex. I had a conversation with him about it. Yes.

Q. Where?

A. It was at one of the association meetings. I don't know which one.

Q. What did he say to you, and what did you say to him?

A. He asked me if we were trucking into the state of Colorado, and I said yes, and he said, "Are you aware that Colorado is not a trucking market?"

Q. What did you say?

A. I said—I am not quite sure what I said. I always had a lot of excuses about our trucking operations, but we had made arrangements with our paper supplier to pick up wallboard paper in Denver, and my response to him was that, "We are picking up wallboard paper in Denver on our trucks, and we are hauling wallboard into Colorado on [1892] our trucks.

Q. Why did you make an excuse, Mr. Simpson?

A. Because——

Mr. McSweeney. Objection.

The Court. Overruled.

The Witness. Because of competitive practices that occurred every time we trucked into a new market, and they would take place. You really wouldn't mind if it took place with just trucking. We can compete with that very well, but it generally would take place with a lower price, even though just dropping the price an additional discount of the list or, alternatively, a warrantee list, either one is to reduce price, and I was afraid the price would go down.

By Mr. Fricano:

Q. By whom? Who was dropping the price?

A. Competitors.

Q. Members of the Gypsum Association?

A. Yes.

Q. Did your excuses work?

A. Sometimes they did, and sometimes they didn't. Perhaps they slowed it down a little bit, but, basically, I would say most of the United States today is a trucking market on account of our practices. All of the market in the southwest is a trucking market. Eighty percent, perhaps, of [1893] what Republic sells is delivered by truck.

Zero percent was delivered by truck before Texas Gypsum and Republic came on the stream.

[1894] By Mr. FRICANO:

Q. Where in Texas?

A. In Texas and Oklahoma and in the primary market. There was some trucking in the market in New York, for example. There wasn't any trucking in California at that time.

Q. Could you slow down a little bit? I am perhaps the biggest offendor at talking fast, but even I am having trouble.

The COURT. Between your Texas accent and talking so fast, it is difficult.

By Mr. FRICANO:

Q. Did anyone else ever confront you at a Gypsum Association on trucking, other than Mr. Greene?

Mr. MCSWEENEY. I object to that, if the Court please.

The COURT. Why?

Mr. MCSWEENEY. Because of the language he uses in questions and the way he phrases his questions. It is an unfair characterization of the testimony and it is an unfair question.

The COURT. It wasn't a characterization.

The objection is overruled. He can answer the question.

You may answer the question.

The WITNESS. I had one other conversation. [1895] Mr. Harper of Kaiser Gypsum Company. I had some comment from him about our trucking practices in California and our processing practices. We were shipping wallboard to California, half a continent away. It took two to three weeks to get there and the only way we could sell in California was to cut the price and we did. We attempted to stay 5 per cent under the market.

We did it because it was the only way we could ship it and make money. We could ship it into the Midwest, but there was more favorable freight rates to California from our plant.

Mr. HIERING. None of this is responsive and I move to strike it all.

The COURT. Overruled.

Go ahead.

The WITNESS. I had conversation with Mr. Harper.

By Mr. FRICANO:

Q. What did he say about the shipping of board to California?

A. He made comments about the fact we were cutting prices in California.

Q. What did you say to him?

A. I didn't say much, if anything. I got out of the conversation as quickly as I could.

Q. What did he say about trucking?

[1896] A. He didn't like the fact that we were trucking in West Texas.

Q. Did he give you an explanation why?

A. No.

Q. Mr. Simpson, why did you do this? Why did you engage in this exchange of competitive information with your competitors?

A. I had one prime motive and at the time we came on stream the price in our prime market was rapidly deteriorating and my motive was to try to keep it from deteriorating any further. It was much lower in our market than in other places in the United States and I didn't think it was right and I wanted to prevent the continued decline, so our company could make money. We were losing money and I wanted to prevent the price from sliding down, so we could stay in business.

Q. How did this exchange of pricing information accomplish your objective?

A. It didn't in the long run, no. In the short run, it might have slowed the price decline down.

Q. What area are you speaking of?

A. I am speaking of my prime market, the Southwest, Texas, Oklahoma and the states surrounding.

Q. Mr. Simpson, were you at all concerned about the legality of these discussions that you were having with your [1897] competitors?

A. Yes.

Q. Did you continue to engage in them, in any event?

A. I did, yes, sir.

Q. Why?

Mr. McSweeney. That question has been asked and answered.

The Court. He just told you why.

Mr. Fricano. All right.

By Mr. Fricano:

Q. Did you have any other motives or any other reason other than the business one you just advanced?

A. Well, I had, at that point. I was concerned about the legality of it, yes. I convinced myself that I had the right to do it under the Robinson-Patman Act.

Q. Did you continue on thereafter, then?

A. Yes.

Q. Did you keep a record of conversations which you had with your competitiors over the period late 1964, '70 or '71?

A. No.

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[1901] By Mr. Fricano:

Q. Did you ever make any telephone calls?

A. Yes.

Q. Who did you learn who to call?

A. Well, I knew from the first meeting in conversation with Mr. Watt to call him and Mr. Gimlin of U.S. Gypsum; Mr. Brown, I knew to call him, Mr. John Brown, and I subsequently learned that if he wasn't there for some reason to talk to Mr. Atwell, or to talk to Mr. Greenwood from Celotex, or in his absence Mr. Miller. And over a period of time I just learned who to talk to. If I didn't know, I would then ask somebody.

Q. Who would you ask?

A. Usually I would ask Mr. Miller of Celotex.

Q. Did he give you the information then?

A. Yes.

Q. Did anyone else ever provide you with the names of people whom you could call at your competitor companies?

A. I don't remember anything specifically about someone else. I am sure probably it happened, but I have no specifics, no, sir.

Q. Was there any change in price in the late summer of 1965 on fire rated board?

A. There was a price change in the latter part of 1965, December, on all products. I know that the differential [1902] between the price of half-inch wallboard and five-eighths inch wallboard varied from time to time.

You say August of——

Q. Late summer of 1965. And I am referring specifically to fire rated board, if you know?

A. I do not know.

Q. Was there a change subsequently on prices of wallboard?

A. There was a change in December of 1965, and in our area for sure, and I think there was a price increase across the entire United States. There was a significant price increase in our market.

Q. What was the status of housing starts when this price increase went into effect?

A. Well, in my opinion—in 1966, and the price increase occurred in December of 1965, in 1966, if I remember correctly, that was a year of rather significant decline in housing starts. As a matter of fact, I think it's the most significant decline with the exception of this year and what is happening now.

Q. Did that price increase stick?

A. Yes.

Q. Did housing starts go back up?

A. Housing starts started back up about a year later, I guess. The price went up in December of 1965. It went up [1903] again, I think, in March or April of 1966. It went up again in August or September, sometime in that time period of 1966. Yes, it went up over about a year's period; well, I guess it was in excess of that, in our markets. It was $10 a thousand more in December of 1966, or late 1966, than it was in the same period the year before.

Q. Were major producers of gypsum board competing with you in this period?

A. Yes.
Q. Did these price increases which they put into effect stick?
A. Yes.
Q. Did you continue in any size, shape, form or manner your trucking activities?
A. Yes.
Q. Did they meet your competition?
A. In some cases they did, but it was meeting trucking with trucking rather than a price decrease.
Q. Did anyone ever tell you why at the Gypsum Association?
A. No.
Q. Did you ever find out why?
A. I found out in the marketplace. We had one of our major independent competitors—I say major independent, but it is a single plant producer which is a division of a very large company—whose pricing policy was to discount price. [1904] And we saw very quickly in early 1966 that the majors were not responding to his lower prices.
Q. Who was that?
A. Dierks Forest in Arkansas.
Q. Had they been responding to his lower prices before?
A. Yes.
Q. How long a period of time did this hold?
A. Oh, from the price increase in late 1965 through, I guess it was, the middle to latter part of 1967.
Q. How were your profits in that time period?
A. Well, that was the first time we made any money.
The price, the average price of half-inch wallboard in Texas and Oklahoma went from $28 delivered, where it had been for about a year, to $36 delivered. And we picked that price increase up from a salesman, and I believe it was U. S. G. that announced it. It was some time in November, I believe, of 1965. We had been losing a lot of money up until that time. Now, we finally started selling wallboard at the higher price in early 1966. People have got a lot of inventory in stock on a price increase, particularly when there is a price increase that significant. It was $8 a thousand, from 28 to 36. So it was really late January or February before we started experiencing the higher price or any volume. And we had been breaking even, or a little loss, up until that time. And then we started making

money. [1905] And our fiscal year is the same, June 30, it is the same as the Government's fiscal year. In that year we broke even, basically, but we made enough money the second half of the year to offset our losses the first half of the year.
In our fiscal 1967, which was the first full year that we had ever experienced reasonable prices, good prices, reasonably good prices, meaning they were about 20 per cent lower than they were when we went into business, we were glad to just get them back to there, but we had a profit on four million or so of sales of a little over 400,000 pre-tax, which is the first year we made money.
Q. In this time period when the major producers were not meeting your competition, did they continue to call you?
A. There were a lot less calls than I had experienced before. There may have been some calls, but a lot less calls.
Q. Do you know why there were fewer calls?
A. Well, there——
Mr. McSweeney. I object to what he knows, imagines or whatever.
The Court. Well, you will have to tighten that question up if you want to ask it. You can't ask it that way.
Mr. Fricano. Yes, Your Honor.

By Mr. Fricano:

Q. Did any of the major producers, when you had [1906] conversations with them at the Gypsum Association, ever tell you why they were calling you less frequently in this time period?
A. I never had a conversation per se that they were calling less times for such and such a reason, no, sir.
Q. When you say "per se," did you ever get any information generally?
A. No, there was less competitive activity in the market, and there was less activity because——
Q. What do you mean by less competitive activity in the market?
A. The companies were not cutting prices. Rather than—if we were giving two truckloads at a carload price, for example, rather than giving a dollar or two dollars a thousand cheaper price, they would give truckloads or not meet it.

Q. When you made your calls, your telephone calls, did the competitor whom you called always answer your questions?

A. Yes. There may have been some times when he didn't.

Q. Did he give you a reason when he did not?

A. No.

Q. Did you ever refuse to respond?

A. Towards the end of the period, I guess in the late 1969 or 1970 period, there were some reasons that I—there were some times that I would not answer a question.

[1915] Q. Referring back, Mr. Simpson, to the exchange of pricing information at the Gypsum Association meetings, when was this done?

A. Well, it was done at—as I have already testified, I guess, I did it in nearly every association meeting I went to, except the last one or two, perhaps. It was done at all times, during the course of the meeting.

Q. Well, can you elaborate on that?

A. Well, coffee break, having cocktails, dinner.

Q. Were there ever more than just you and the other person present?

A. No. There would be conversations one on one.

Q. No witnesses?

A. No witnesses.

[1927] • • • • •

Q. Were you on any special task forces?

A. There was a special task force formed to study the overall marketing implications of promoting the use of gypsum wallboard, and I was either on the committee—I was on it because I was a director of the association.

Q. Did you ever make any presentations in that connection at a Gypsum Association meeting?

A. Yes, I did.

[1964] • • • • • •

Q. Now, did the exchange of prices between you and your competitors have any effect at all on preventing lower prices within a given zone? Did you understand the question?

A. Say it again, please.

Q. I will rephrase it.

Using your Fort Worth-Dallas example, did the [1965] exchange of prices on sales to customers in Fort Worth in a declining market in any way slow down or retard lower prices in the Fort Worth market?

A. Yes, it would. It would slow down, not decline.

Q. In what way?

A. Well, if a competitor called me, for example, and he had a report from a salesman that Republic had dropped the price to John Doe Lumber Company of Fort Worth, and if in fact we hadn't, and a competitor called me and I told him that we had not dropped the price, then the price wouldn't drop.

Q. In addition to yourself, Mr. Simpson, was there anyone else at Republic who was authorized to exchange prices with officials of the Defendants?

A. Yes.

Q. Who?

A. Two other individuals. First Mr. John Maddox, who was our Vice President of Sales, who is now no longer employed by Republic. And, Mr. Max Montgomery, who is presently Executive Vice President of Republic Housing.

Q. Do you remember when Mr. Maddox was employed by Republic?

A. He was employed from the startup in the summer of 1964 through, I believe, the spring of 1967.

Q. And Mr. Montgomery, when was he employed?

[1966] A. He was employed at startup in 1964 and is still employed by Republic.

Q. Throughout their tenures, did they engage in the practice of exchanging prices with officials of the Defendants?

A. Mr. Maddox, yes. Mr. Montgomery, he started out as a field salesman, became an assistant sales manager. And, at the time that he became the sales manager then he would have participated in it, yes.

The COURT. When was that, sir?

The WITNESS. That would have been in the spring of 1967 he became sales manager when Mr. Maddox left.

By Mr. FRICANO:

Q. Did they have their own offices?

A. Yes.

Q. When were they authorized to engage in this practice?

A. Mr. Maddox, shortly after I made the decision to do it, after that first Gypsum Association meeting. And Mr. Montgomery, shortly after he became sales manager after Mr. Maddox left.

Q. Did you tell any of your competitors that it was all right to call Mr. Montgomery and Mr. Maddox?

A. Yes.

Q. Whom did you tell?

A. I cannot remember specifically, but I am sure I told several of the individuals.

[1967] Q. Where did you tell them?

A. Either by telephone or in person at a Gypsum Association meeting.

Q. Was there ever more than one telephone call coming in to Republic at the same time, to your knowledge?

A. I don't remember.

The COURT. I really don't understand that.

Mr. FRICANO. It was an unartfully worded question, Your Honor.

By Mr. FRICANO:

Q. From time to time you received telephone calls directed to you from your competitors; correct?

A. Yes.

Q. You would be on the telephone?

A. Yes.

Q. Was there a time from time to time when you would be on the telephone with a competitor when another competitor was trying to reach you?

A. There could have been a time. There could have been a time that I could have been talking to somebody and Mr. Montgomery and Mr. Maddox talking to somebody else.

Q. An official of a Defendant?

A. Yes.

Mr. KECK. Your Honor, it is getting [1968] difficult to determine from these questions whether you are asking for fact or a hypothetical situation. He said "could."

Mr. DELONE. I move to strike the answer because he said yes.

The COURT. Oh, come on, it is not that important.

By Mr. FRICANO:

Q. Now, in the year 1964 when you first joined the Gypsum Association, and in the year 1965, with what degree of frequency did the officials of the Defendants call you?

A. 1964–1965, I would say very frequently.

Q. Can you put it in terms of how many times a day or how many times a week or a month?

A. Well, there were times when perhaps I might stay an hour or so a day on the telephone talking to various competitors in exchange of price information.

Q. How about in 1966?

A. 1966 there was a period where there wasn't any calls, and calls were much less frequent.

Q. 1967?

A. 1967, less frequent, except toward the latter part of 1967 I'd say startup began again.

Q. 1968?

A. Picking up also.

Q. 1969?

[1969] A. 1969 is just back like it was in the 1964–65 period. Very frequently.

Q. 1970?

A. The same.

Q. 1971?

A. Well, 1970, it appeared, I guess, that we started lifting the interchange with other companies.

Q. Did you ever instruct Mr. Maddox or Mr. Montgomery to give explanations and excuses when officials of the Defendants called concerning your trucking practices?

Mr. MCSWEENEY. Object to that question, Your Honor. What he talked to his own internal company people about is incompetent, immaterial, and it is hearsay to these Defendants.

The COURT. It is hearsay. Overruled. You are asking what he said?

Mr. FRICANO. Yes, Your Honor, that's what I said.

By Mr. FRICANO:

Q. Did you ever instruct them?

A. Yes, I did.

Q. What did you tell them?

A. Well, the instructions first were in terms of just exchanging price information, to be careful and limit it to after the fact.

[1970] But, in addition to that, we had a trucking operation. We are on a rail line that didn't have the best of service. For example, it would take us a week to get a railcar from our Duke, Oklahoma plant to Oklahoma City. A truck can drive it in four hours.

And this was the time when unloading allowance, for example, and price cuts were being used to meet our truck delivery.

And I instructed them to say, "Look, the reason we are doing this is because of our rail service—that was true—and we just could not compete." Therefore we had to put trucks in there to get the good service, and we were selling the trucks when we received a load for our carload order, which was two trucks. We'd solicit orders on that basis. As a matter of fact, I instructed Mr. Montgomery and Mr. Maddox both to say the reason we are doing it is so that we can be competitive from a service standpoint.

[1979] • • • • •

By Mr. FRICANO:

Q. Were you ever—I will withdraw that. Was there ever any comment made to you by any of the officials of the Defendants concerning Republic's allegedly granting extended credit terms?

A. Yes. There were comments.

Q. By whom?

A. Well, over a period of time, by nearly everyone.

Q. Now, did you have, for your company, certain terms and conditions for the sale of your product?

A. Yes, we did.

Q. Are they commonly known in the industry as credit terms?

A. That is correct.

Q. Could you please explain what they are and their function and their purpose?

The COURT. Before you do that, the testimony as to what the witness was told by his men in the field, I instruct you that you should disregard, that it was hearsay. The other testimony, as to what occurred between him and representatives of certain corporations, is proper evidence.

Go ahead.

[1980] By Mr. FRICANO:

Q. Would you please explain the reasons for a corporation such as your own having what is commonly known as credit terms?

A. Well, it is the common practice in the building material industry—all idustries, I guess—to have stated terms, so that you know, the customer knows, when he buys the product, when he is supposed to pay for it.

In the gypsum industry, there was a two percent cash discount given for paying for it within those stated terms, so that the customer had an incentive to pay for it like he was supposed to. If it went beyond that, then it became due net at a certain period beyond the discount date and beyond that it was past due. So that it was merely a clear definition, both to the seller and to the buyer, what was expected of each in terms of when the product was to be paid for.

Q. If a customer purchased a thousand dollars worth of wallboard from Republic and paid within a certain specified period of time, would he then get a two percent cash discount from that thousand dollars?

A. That's correct.

Q. And what would that, then, be?

A. $20.

Q. So how much would he then pay?

[1981] A. $980.

Q. Now, if he didn't qualify within the time period for the cash discount, what, then, would he pay?

A. He would pay $1,000.

Q. Now, if he didn't pay within that last time period, what would happen?

A. He would go past due, and he would be shut off from any further shipments until it was paid for.

Q. Now, what is an extended credit term, within the context of my questions and your answers?

A. Extended terms would mean that he could have extended time from the discount date and still get the discount, or, alternatively, he could have an extended time from the net due date and still pay for it and either not get cut off or have his line of credit increased or not reduced, or something like that.

Q. Was this used as a method of competition in the gypsum industry, giving extended terms?

A. Oh, yes. Yes, sir, it sure was.

Q. Were there exchanges between Republic and the officials of the Defendants with respect to extended credit terms?

A. There were; yes. There were questions and answers.

Q. When Mr. Watt first told you about the practice in the industry, back in October of 1964, did he mention [1982] credit, or did he limit himself to prices?

A. Well, his comment was, "You will be asked questions, and there is certain industry practices," something to that nature, "and be honest in your answer."

Q. Did you ever have any exchanges with Mr. Watt on credit, extended credit?

A. I am sure I did. I do not remember a specific conversation, though.

Q. Do you know, of your own knowledge, whether or not any of your competitors, officials of the Defendants, were exchanging prices and other competitive factors between themselves?

A. Yes, they were.

Q. How did you know that?

A. Well, in conversation with a person, I would ask him a question about price, and, in the response, it would be told to me his price was so-and-so because he met so-and-so, and I said, "How do you know that," and he said, "Well, I talked to them."

Q. Did this happen from time to time?

A. Yes.

Q. Well, did Mr. Miller ever give you the names of people to whom you could talk?

A. Yes. I would ask him a qu stion, if I didn't know who to talk to in a specific——

[1983] Q. Let's identify Mr. Miller.

A. Mr. Don Miller of Celotex Corporation.

Q. And what would you ask him from time to time?

A. If I didn't know who to talk to in a particular company, I would ask him who to talk to.

Q. Did you ever get any information concerning prices or other competitive practices from one competitor who had obtained it for you from someone else?

A. Well, from time to time, in conversations with Mr. Miller, I would ask him questions about what a competitor was doing, and he would tell me.

Q. Did he tell you how he got the information?

A. He said he would have talked to them; yes, that he did talk to them.

Q. Can you identify the competitor, if there was one, specifically?

A. Well, one was United States Gypsum Company.

Q. Why couldn't you call Mr. Watt directly?

A. I just didn't feel like calling him.

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[1987] • • • Mr. McSweeney: Mr. Fricano just made a misstatement that I just had the document, and I did not.

The Court. All right, but there was no reason to shout at me about it.

Mr. McSweeney. I was not shouting at Your Honor.

The Court. Let's not argue it.

Mr. Fricano. Just one comment with respect to this, if I may.

The Court. Just give him the document.

Mr. Fricano. I will give it to him, but there are other copies of this document that defense counsel have in this room.

Mr. McSweeney. I don't want copies of any documents except the document Mr. Fricano used to refresh the witness.

The Court. He is handing it to you.

Mr. McSweeney. Thank you.

[1988] This document purports to be a copy of a transcript of Grand Jury testimony. It says on the first page, "Taken December 1, 1971," and, in part, it purports to be some testimony of—the name typed on here happens to be Brian B-R-I-A-N, Simpson, but it appears from the context that it is Rhyne Simpson, the gentleman who is on the stand. And the document consists of some pages from 137 to 299 and then a subsequent page of a certificate.

My objection is, in effect, this is a script which was shown to the witness for purposes of refreshing his recollection and, thereafter, after reading—how much of it, I don't know, but I know he read for some time, to the extent where counsel said something to this effect, "You don't have to read all of it," and it is improper to show a transcript with questions and answers to a witness, even though it was stated it was for the purpose of refreshing his recollection. And, additionally, this transcript—this document, which I would, when I am through, ask the Court to mark as a Court exhibit, contains lines on it in yellow pencil, on certain questions and answers, apparently for purposes of emphasis or for purposes of calling it to a reader's attention. I noticed, at least, on pages 282 and 283, it has lines. I haven't made an inspection of the entire document, but, if it is retained as a physical exhibit for the Court, that can be determined.

[1989] The COURT. Now—go ahead. I'm sorry.

Mr. MCSWEENEY. Your Honor, at the time this was done, I did ask Your Honor to look at the document, and Your Honor declined to do that with the statement that it didn't matter what was in front of him for purposes of refreshing his recollection.

There may be many things, I appreciate, that can be used to refresh recollection. Your Honor has given the example of a ham sandwich, and I wouldn't object to that, but I objected because this was a transcript of questions and answers. In effect, it is like a script for the benefit of the witness.

The COURT. I think that I took care with that witness to instruct him as to what was meant by refreshing the recollection, and I said to him, "If, after you look at that, that give you a present recollection, not accepting what is in the document, but it gives you a present recollection, independent of that document, then you may testify," and the witness said it did.

Now, I see nothing wrong with that. However, I will have that marked, if you wish, as a Court exhibit.

Mr. MCSWEENEY. I do wish.

The COURT. And we will retain it for reviewing authority, and we will give it back to Mr. Fricano [1990] for such use as he has with it during the trial, and, at the close of the trial, will you give that to the Clerk so it may be marked for Court Exhibit 1, for reviewing authority, if important?

Mr. FRICANO. If the Court wishes, I will make copies of it this evening and put that permanently in the hands of Mr. Keene, or, I should say, Mr. Grainer, and there will be no question.

The COURT. All right. That way, any reviewing authority will have it for review.

It has never been my policy to look at what is shown a witness to refresh his recollection but, if I am wrong, there is a proper place for that to be determined.

[1991] Mr. MCSWEENEY. Your Honor, I hope I understood Mr. Fricano that he will put in as the Court exhibit the original.

The COURT. He will make a copy for his own use. That is what he said.

Mr. MCSWEENEY. And I——

The COURT. Mr. DeLone is standing. Are you objecting to that?

Mr. MCSWEENEY. I have not finished.

Mr. DELONE. Your Honor adverted to making it Court Exhibit 1. I think there is a Court Exhibit 1. I think it is the collection of newspaper clippings.

Mr. FRICANO. If Your Honor please, I would rather it be a Celotex exhibit. I don't think the Court should mark an exhibit of this character as its own.

The COURT. Since it is not going into evidence, and since the record will indicate it is being done at the request of Celotex, and the same is true of the newspaper reports, I don't see any problem. The only reason I am doing it is so they will be available for the use of a reviewing court.

Mr. MCSWEENEY. And we should take precautions that it not go to the jury.

The COURT. The Court exhibits are not going to the jury.

[1992] Mr. MCSWEENEY. That is why I suggested it be a Court exhibit.

It is my view this was deliberate misconduct by the prosecutor in showing a transcript to a witness, his own witness then under examination, and it is highly prejudicial to the Celotex

Corporation and in my view to all of the defendants, and for the reasons I have stated, I move for a mistrial.

The COURT. The motion will be denied.

Mr. MELLOTT. If the Court please, I would also like to make a motion, I might add, I believe the other defendants all join in Mr. McSweeney's motion for a mistrial.

The COURT. Nothing is added by telling me that, because that is the rule anyway.

Mr. MELLOTT. I just wanted to be sure that was clear on the record.

I believe that I am also speaking for all the defendants.

I believe that Government counsel has been engaging in deliberate misconduct in the questioning of this witness. He has been asking questions designed to elicit hearsay, without laying any proper foundation for it, without showing any basis for firsthand knowledge. When we have objected, as I did this morning, the objections have been overruled [1993] and when the answers finally demonstrate the correctness of the objections and Your Honor explains it to the jury—and we appreciate that—but Your Honor, I do not believe that that corrects the problem. It does not correct the prejudice.

The same type of thing happened yesterday at transcript 1898 and 1899 and we therefore move for a mistrial.

The COURT. Well, I have no impression that Government counsel is doing anything deliberately to bring to the attention of the jury improper evidence. I feel that much of the hearsay objections have not been proper objections at all, because it wasn't hearsay and that is the reason I did overrule it.

The motions will be denied.

Mr. BARTLIT. I——

Mr. MELLOTT. I assume there is no purpose of my making any further comment.

The COURT. I think that is right.

Mr. MELLOTT. But the question——

The COURT. You will make it anyway, even though there is no purpose.

Go ahead.

Mr. MELLOTT. The questions are broad generalizations without identification of times, peoples, places or any showing of knowledge whatsoever.

Mr. BARTLIT. Your Honor, I would be [1994] more precise in the way I would word that.

The COURT. Oh, yes, I want to call your attention to something, Mr. Bartlit.

You objected to people speaking in court so the jury could hear it yesterday.

Mr. BARTLIT. Yes, sir.

The COURT. I could hear this morning when you were talking.

Mr. BARTLIT. I apologize. I do appreciate it, because I certainly don't want to do anything like that.

My problem with the two incidents is a slightly different one. In both instances—in one instance Mr. McSweeney objected. I first objected and Your Honor overruled the objection, and it appears, at least from the transcript, upon reflection the objection had merit and yesterday at 1899, at the bottom of the page, the Court turned to the jury and said, "Ladies and gentlemen, please disregard the answer to that question."

That same thing happened today. I think I would agree with Your Honor, I don't think it is a hearsay problem in each instance. I think it is a question of foundation, I mean lack of first-hand knowledge or simple irrelevance in the case of it yesterday. That is not the issue. The issue is if—it may be that some evidence to which an objection should have been sustained can be corrected by [1995] telling the jury later on to ignore it. That may be. The testimony that has come along in these two instances, I don't think is of that nature. I think the grey area answer when the witness said, "I did this because I thought it was a grey area in the law", I don't think that can be corrected by telling the jury later on they should disregard that.

What I am very respectfully saying is that is the basis for our motion for a mistrial. What I am saying is I hope as we move into this, the Court will at least have in mind our position. We don't think that all of these—I know some of these can be corrected by Your Honor turning to the jury.

The COURT. So I understand you, Mr. Bartlit, are you accusing the Court of overruling the objections intentionally and then later telling the jury to ignore it for the purpose of bringing prejudicial matter to the attention of the jury?

Mr. BARTLIT. Certainly not, Your Honor.

The COURT. Let me say this to you——

Mr. BARTLIT. Certainly not.

The COURT [continuing]. I don't contend I am perfect. I strive for it, but I don't quite reach it and I don't reach it, perhaps, by a long shot, but when I make a ruling and on reflection I correct it, it is because I think that is the way to accomplish a fair trial. If I am [1996] erroneous in the first place, so be it. I don't try to make erroneous rulings.

Mr. BARTLIT. Yes, sir, and——

The COURT. I then try to correct it, if I think I have made one.

If counsel feels you would prefer I don't do that, I will desist. I won't correct it, even if I know a ruling is wrong.

Mr. BARTLIT. No, sir My understanding of what the Court did yesterday and today is precisely as what Your Honor stated. Your Honor reflected and decided the jury should disregard it.

The COURT. Judges, like lawyers, say things that are incorrect and then we try to correct them.

Mr. BARTLIT. Yes, sir. And my only position is that on occasion there is evidence like that that can't be so cured, and we thought the grey area comment was evidence like that.

We appreciate Your Honor making the remark to the jury and we want that to happen. What we are saying, sometimes things are so prejudicial that it can't be cured.

The COURT. If that happens, you will get a mistrial. In my opinion it has not happened.

* * * * *

[1998] By Mr. FRICANO:

Q. Mr. Simpson, I wish to direct your attention to conversations which you had with officials of the Defendants with respect to trucking services that you were offering to customers which differed from their established policies.

When you were asked by your competitors about the particular trucking service in issue which you were offering, was it with respect to a particular customer or account or a broader area?

Mr. MCSWEENEY. Objection, if the Court please. He is asking on a conversation for which there is no foundation laid.

The COURT. Establish when and where.

By Mr. FRICANO:

Q. From time to time during the period 1964 to the time that you resigned from the Gypsum Association you had conversations—did you not—with officials of the Defendants concerning the trucking services which you offered; is that correct?

A. Yes.

Q. All right. Now, in those conversations in that time frame with these officials, did they relate to a particular account or customer or to a broader area covering many accounts of customers?

Mr. MCSWEENEY. I object to the question. [1999] That's not a proper foundation for the eliciting of a conversation between two people, a span of that many years. No foundation laid.

The COURT. Overruled.

The WITNESS. Both. To a conversation happening relating to a specific account, and also conversations relating to an area.

By Mr. FRICANO:

Q. Did it ever happen with respect to an entire zone?

A. Yes.

Q. To cities within the zone?

A. Yes.

Q. Where there were many customers located?

A. Yes.

Q. Did it ever involve more than just one customer in the conversation?

Mr. MCSWEENEY. If the Court please, I object. That's an improper question to be asking him about an oral conversation. No foundation. Not asking him what was said or who said it, just a general overall question.

The COURT. You may answer the question. I assume this is during that time period that you referred to before?

Mr. FRICANO. Yes, Your Honor. I tried to qualify my questions to that very time period with the [2000] officials of the Defendants.

The WITNESS. It would, yes, refer to more than one customer in some conversations.

By Mr. FRICANO.

Q. Were these mutual customers of Republic's and the Defendants?

A. Mutual customers. And perhaps exclusive customers as well.

Q. You testified yesterday that—and this morning—that you exchanged this information over the phone and on occasion Gypsum Association meetings? Do you recall that?

A. Yes.

Q. Did you ever do it anyplace else?

A. I have no recollection or no memory of doing it anyplace else.

Q. Did you have any buy-sell relationships or arrangements with any of the Defendants?

A. Yes, I did.

Q. With whom?

A. Celotex Corporation.

Q. Did you ever negotiate with them face-to-face on buy-sell?

A. Yes, I did.

Q. By the way, what is "buy-sell," Mr. Simpson?

A. We didn't have a buy-sell arrangement with them. [2001] That was wrong. We had a sell arrangement with them.

We private-labeled. We made our wallboard but put their end tape on it in our plant in Duke, Oklahoma and shipped it to them to their customers in that marekt area, I believe of Oklahoma and Kansas. Maybe Missouri.

Q. Did you ever have any discussions on these occasions when you were discussing selling arrangements between Celotex and your corporation concerning the exchange of prices in the market?

Mr. McSWEENEY. I object to that as suggestive and leading. He previously asked him about it and he said he didn't.

The COURT. Let me hear it, please.

[Question read.]

The COURT. You may answer it.

The WITNESS. I am sure that some time over the course or period of time that I talked to Celotex that I had conversations with them about exchange of price information, at the occasion of negotiating with them either in our office or their's concerning the sale of gypsum wallboard to them. I don't have any specific memories, but I am sure it came up at some time in that period.

Mr. McSWEENEY. I move that the answer be stricken on the grounds I stated previously.

The COURT. You don't remember whether [2002] you had or didn't have?

The WITNESS. I am sure I had the conversations, Your Honor.

The COURT. Do you remember having them? What I am getting at, you can't speculate, you see.

The WITNESS. Well, yes, I had conversations with them sometime in that period.

The COURT. All right.

• • • • • •

[2007] • • • Q. Now, if you got the information that the price was being cut, what did you do?

A. I met the price.

Q. Did you ever find out what business judgments the Defendants made when they got information from you?

Mr. WARNKE. Your Honor, might I ask that the question be rephrased and referred to the Defendant corporations. There has been no testimony of talking with Mr. Colon Brown or Jay P. Nicely.

Mr. FRICANO. The Defendant corporation. Would you read the question, please.

[Last question read.]

The WITNESS. Yes.

By Mr. FRICANO.

Q. What did they do?

A. Well, specifically—For example, a question to me, "Did we offer two trucks at the carload price to a particular account?" And I would answer, "Yes," but with some reasons. And then the competitor dropped the price to that particular account.

Mr. McSWEENEY. Your Honor, I object to that [2008] and move the answer be stricken. He refers to testimony concerning some conversation which is completely unidentified as to——

The COURT. I think that's just an example; isn't it?

The WITNESS. Yes.

Mr. McSWEENEY. Well, I would suggest to the Court that it is not proper for him to give examples. There should be a foundation laid and he should specify what he is talking about and be limited to a proper type of testimony concerning a conversation.

The COURT. Objection will be overruled. The jury will understand he gave that as an example of what he was talking about

rather than identifying it with a particular transaction to try to make it clear.

[2012] Q. Did any of the Defendants publish list prices?

A. Yes.

Q. Did United States Gypsum have list prices?

A. Yes.

Q. Did Georgia-Pacific have list prices?

A. Yes.

Q. Did Celotex have list prices?

A. Yes.

Q. Did National Gypsum Company have list prices?

A. Yes.

Q. How did they compare?

A. They were equal.

Q. All right.

Mr. MELLOTT. If the Court please, I move to strike that answer, unless the witness identifies the time, the dates the price lists were issued.

By Mr. FRICANO:

Q. Mr. Simpson, when you got in business—even before you got into business, did you try to get your hands on your competitors' price sheets?

A. Yes.

Q. Did you study them?

A. Yes.

Q. Did you compare them?

A. Yes.

[2013] Q. Did you do that throughout the time period that you were an official of Republic Gypsum?

A. Yes.

Q. And when you compared them, what did you find?

A. I found that the prices were equal.

Q. Now, have you ever heard the term, "transaction or market prices"?

A. Yes.

Q. Can you tell us what they are?

A. The market price is the price that exists in the marketplace, as opposed to the list price for that particular market zone.

Q. Are prices in the actual marketplace, from time to time, below those of list prices?

A. Yes.

Q. When discounts are given from list prices, when there are deviations from list prices, what form do they take?

A. Well, they can take several forms. One is to merely invoice at the agreed-to price. Another way is to invoice at the list price and give the customer a rebate with a check crediting back to the agreed-to price. Another way is to invoice at the list price and have an agreement with the customer to pay at the agreed-to price and merely deduct back to the agreed-to price. Those are [2014] the most obvious ones. There may be some other ways to do it.

[2015] • • • • •

By Mr. FRICANO:

Q. Defendant corporations, in that time period, were those people that you were exchanging this information with—did they ever offer to you excuses or explanations for their activity?

[2016] • • • • •

The WITNESS. There were excuses given to me.

By Mr. FRICANO:

Q. Did Mr. Watt ever offer any excuses that you can recall?

A. Not that I can recall specifically; no.

The COURT. You will bear in mind, now, Mr. Mellott, that we have a sort of a stipulation—I think it was proposed originally by Mr. Bartlit—in this case, which I think governs this situation.

By Mr. FRICANO:

Q. Now, returning, if you would, Mr. Simpson, to the methods by which you could bill a customer when you were [2017] doing it at less than the list price you mentioned certain examples. You said, I believe, that you could invoice the customer—that is the bill, isn't it, the customer gets?

A. Yes.

Q. That you could invoice the price at the actual list price?

A. Yes.

Q. And then give him back the actual difference between the list and what he was paying in the form of a check?

A. Yes.
Q. What kind of a check?
A. A company check or a cashier's check.
Q. Did Republic Gypsum use company checks?
A. There were times when we used company checks.
Q. And there were times when Republic Gypsum also used cashier's checks?
A. Yes, there were times when we also used cashier's checks.
Q. What was the reason for using a company check at one time and a cashier's check at another time?
A. A cashier's check was more difficult to trace.
Q. Do you know whether or not the Defendant corporations in this case employed the same practices?
A. Yes.
[2018] Q. What significance, if any, is it that a cashier's check is difficult to trace?
Mr. McSweeney. If the Court please, the question is now asking this witness to give some conclusion as to the significance.
The Court. Only—you can only ask that as to him.
Mr. Fricano. That is correct.
The Witness. I did it for competitive reasons.
Mr. McSweeney. If he is asking him, Your Honor, I object, because it is of no relevance and materiality as to what the significance was to him or his company, Republic.
The Court. No, only to make it more understandable in general context. For that purpose, I am going to allow him to answer.
The Witness. I did it because it is for competitive reasons. It was more difficult to trace, had less chance of somebody dropping the market as a result of finding out about the price.
By Mr. Fricano:
Q. When you say "somebody," whom do you mean?
A. Competitors.
Q. Yet, if they found out, some way, and they called [2019] you, you would tell them; wouldn't you?
A. Yes.
Q. Through the use of a cashier's check, did you also keep the price cut from being discovered by competing dealers?
A. Yes.

Q. By the way, Mr. Simpson, did your customers know you were exchanging information on their business with your competitors?
Mr. DeLone. Objection to it, Your Honor. It is immaterial.
The Court. I don't know how he would know that, anyway.
By Mr. Fricano.
Q. Did you ever tell your customers?
A. No.
Q. Do you know whether or not officials of the Defendants ever told their customers they were doing this?
A. I do not know that.
Q. Now, you stated that there was another method by which Republic gave a discount from list prices, but the invoice showed a—by the way, the list price, in that situation, with respect to the cashier's check—that is a phony price; isn't it?
Mr. Bartlit. Objection; leading.
[2020] Mr. Fricano. Excuse me. I withdraw it, Your Honor.
The Court. All right.
By Mr. Fricano:
Q. The price on the invoice, where a cashier's check is given—is that the real price?
A. It is not the market price. It is not the transaction price.
[2021] By Mr. Fricano:
Q. With respect to the second example you gave, I believe you stated that when the discount or deviation from list price was granted, you could get the money back to the customer through a credit memorandum. Is that what you said?
A Through a deduction.
Q. Would you explain that?
A. List price at the time of the transaction is $36. The market price is $32. The agreement with the customer is to invoice him at $36. Internally for bookkeeping purposes, a $4 credit memo is written and the customer is instructed to pay the invoice on the basis of $32 per thousand.
Q. Now what advantage at all does that form of a transaction have for Republic?
A. The advantage is it is more difficult to trace on the part of the competitor.

Q. Would that also be true with respect to the competing dealers?

A. Yes, if in a given market, you had to meet a certain competitive situation on a given dealer that was below the market for the area, and before the market itself, entire market, fell, yes, it would give you the advantage of not advertising the competitive price that you were forced [2022] to meet, if you wanted to keep the man's business.

Q. Did you ever have any situations where you cut the price to a dealer and the competing dealer found out about it?

A. Yes.

Q. What did he do?

A. He wanted the lower price.

Q. Did any of the officials of the defendants with whom you had these conversations during the period of years from when you started in business to the time when you resigned from the Gypsum Association ever use the term verification?

A. Yes.

Q. In conversations?

A. Yes.

Q. What did they say?

A. Mr. Simpson, I would like to verify a price with you.

Q. Did they ever use the term check?

A. Yes.

Q. Mr. Simpson, did you ever sign an agreement with Mr. Watt or any other officials of the defendants whereby you would mutually exchange prices with each other?

A. No.

Q. Did you have such an agreement, in fact?

[2023] A. I had an agreement, because I did it.

Q. And they did it with you, did they not?

A. Yes.

Q. In your business life as President of Republic Gypsum, have you entered into oral agreements with people?

A. Yes.

Mr. McSweeney. I object to that, Your Honor.

The Court. It is already answer.

Mr. DeLone. I move to strike.

Mr. McSweeney. I move, Your Honor, to strike it.

The Court. All right.

We will ask you to disregard it. I don't see what importance that is. I don't see that it is important to have all this fuss about it, but I will ask the jury to disregard it.

By Mr. Fricano:

Q. Mr. Simpson, yesterday you identified certain officials of the defendants as those with whom you exchanged prices. I would like to ask you some questions concerning others whom you did not name.

Do you know Mr. George Evans of United States Gypsum?

A. I know a Mr. Evans, Mr. Bob Evans, but not a Mr. [2024] George Evans.

Q. Did you ever exchange prices with him?

A. Mr. Bob Evans?

Q. Yes, sir.

A. A few, yes, sir.

Q. Are you certain that his first name was Bob?

A. The conversations were limited, several years ago. I am not certain it was Bob. I think it was Bob.

Q. Do you know Mr. Gimlin's first name?

A. Mr. Bob Gimlin.

Q. Did you ever exchange prices with Mr. Dan Webster at National?

A. Mr. Montgomery did. I have no memory of actual conversations with Mr. Webster.

Mr. DeLone. Move to strike the answer.

The Court. Granted.

By Mr. Fricano:

Q. Did you ever have any conversations with Mr. White of Fibreboard?

A. Yes.

Q. Mr. Jim Moran, President of The Flintkote Corporation?

A. Yes.

Q. Mr. Bill Sikes for Georgia-Pacific?

A. Yes.

Q. Mr. Bill Sitz, S-I-T-Z, of Flintkote?

[2025] A. I don't remember.

Q. Mr. Costa of Kaiser?

A. Yes.

Q. Mr. Al Meyer of Georgia-Pacific?

A. Conversations, but I have no memory of a conversation relating to exchange of price information.

Q. Excuse me, Mr. Simpson. I said Bill Sikes of Georgia-Pacific. I think I misspoke. In fact, I know I did. Was his name Bill or Bob, Robert Sikes?

A. I don't know.

Q. Do you recognize the name Sikes?

A. I recognize the name, but I have no memory of conversations.

Q. Now can you classify the type of customer that you were selling to with regard to these conversations on prices you were having with your competitors?

A. Generally it was the larger accounts in a major metropolitan area, or a chair operation that had multi yards that might be a rural location.

Q. Like Wickes?

A. Yes.

Q. Do you know whether or not Wickes is here in Pittsburgh?

A. I don't know.

Q. Have you ever heard of 84 Lumber?

[2026] A. Yes.

Q. Do you know whether or not 84 Lumber is here in Pittsburgh?

A. Yes, sir.

Q. Have you heard of Lowes?

A. Yes.

Q. Do you know whether or not they are in Pittsburgh?

A. No.

Q. Have you heard of Busy Beaver?

A. No.

Q. Ryan Homes?

A. I have no memory of that.

Q. Of what importance is the large customer in the marketplace?

A. The large customer is usually the customer that gets the lower price first.

Q. Does anything happen after he gets the lower price?

A. In a given period of time the entire market will usually drop as the result of that.

Q. If he does not get the lower price, what happens?

A. The market stays firm.

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[2033] [Whereupon, at 2:03 o'clock p.m. the Court came to order and the jury was duly seated.]

The COURT. Mr. Simpson, did you want to make some kind of change in some of your prior testimony?

The WITNESS. I made a statement that I would like to clarify. It concerns the question from Mr. Fricano about whether I had an exchange with Mr. Watt and Mr. John Brown concerning dunnage. And I was asked a question. I did not remember it.

I was then shown a document, and you instructed me as to what refreshing recollection was, and I don't think I clearly understood.

I would like to make myself clear at this point and to be perfectly fair——

The COURT. Now, wait. Let me see. Does any attorney have any objection to this correction?

Mr. FRICANO. I have no objection. No objection, Your Honor.

Mr. MCSWEENEY. Could I ask the Court what brought it up?

The COURT. Why, yes. I was advised by the witness that he wanted to make a correction.

Mr. MCSWEENEY. Thank you.

The WITNESS. I thought about it during lunch. I talked to the attorney that represents Republic, [2034] and I said, "What should I do?" And he instructed me what to do, so that's what I am doing.

The COURT. Go ahead.

The WITNESS. I do not have a recollection at this time, although I'm sure I did at the time of the Grand Jury testimony, or I wouldn't have said it, but I do not have a recollection at this point of any conversations with Mr. Watt about dunnage. I just don't have that recollection at this point.

The COURT. All right. Then the jury has heard the change, the correction that the witness has made.

Now, the witness has stated he has counsel. His counsel, his personal counsel, apparently, informed me that he wished to make such a change through the tipstaff.

The WITNESS. My conversations with Mr. Watt were infrequent, and the conversations that I had concerned price, concerned terms, concerned trucking, but I have no specific recollection about dunnage.

The COURT. All right. You may proceed, Mr. Fricano.

Mr. FRICANO. Thank you, Your Honor.

[2036] • • • • •

Q. When did you first start purchasing from National?

A. In the first of January, 1971.

Q. Who was your supplier prior thereto?

A. Packaging Corporation of America, Division of Tenneco Corporation.

Q. Why did you stop buying from Packaging Corporation?

A. We were having problems with earnings at the time, and the Credit Department of Packaging Corporation was beginning to put pressure on us in terms of whether we would be able to pay them or not.

[2037] Q. Did you have extended credit terms from Packaging Corporation?

A. Yes, we did.

Q. Did they terminate you or did you terminate them as a supplier?

A. We were not terminated per se. We were in the process of being terminated.

Q. Because you owed them a lot of money?

A. Yes.

Q. And then you turned to National Gypsum, is that correct?

A. Yes, tha. s correct.

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[2080] Q. Mr. Simpson, what was your state of mind when that price was dropping down to $26 in your marketing area and you almost went out of business?

Mr. BARTLIT. I object, irrelevant, Your Honor, and a leading question, also.

The COURT. I imagine the jury knows what his state of mind was.

State it briefly, without going into any detail.

The WITNESS. My state of mind was lousy. We had just lost $700,000.

The COURT. All right. Fine.

By Mr. FRICANO:

Q. Did you do anything about it?

A. We did two things. We published a price increase or tried to get an increase in price and we complained to the Federal Trade Commission.

Q. Where did you complain to the Federal Trade Commission?

A. In Washington.

Mr. BARTLIT. Your Honor, this is really irrelevant to the trial of this case. We are going very far afield and I object to it.

The COURT. Your objection is noted.

Go ahead.

[2081] By Mr. FRICANO:

Q. What did you complain to the Federal Trade Commission about?

A. We complained——

Mr. DELONE. I would like an objection to the line of questioning we are apparently going into. I don't see what it has to do with the merits of the case.

The COURT. I can't either, and I will sustain the objection.

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CROSS EXAMINATION

By Mr. KECK:

[2137] Q. Your prospectus indicates the Republic began commercial operations January 1, '65?

A. I think I referred to that in my—maybe I didn't. The actual plant start-up was in August of 1964.

From a bookkeeping standpoint, the start-up period through the end of calendar 1964 was a capitalized period at which time, on January 1, 1965, it became a start-up cost for bookkeeping purposes.

It became an asset on the company's balance sheet, and that, then, was amortized over a period from, I think, two or three years on some part of it up to ten years on other parts. It is standard bookkeeping practice.

Q. So you were ready to go, in normal accounting sense, January 1, '65?

A. That's correct.

Q. Now, can you tell us who were competing in the Dallas-Fort Worth area, to your knowledge, in 1965? I would like for you to name them for me.

A. The United States Gypsum Company, National Gypsum Company, Bestwall Gypsum Company, and in '65 I believe is when they became a part of Georgia-Pacifiic Corporation.

Q. Bestwall or Georgia-Pacific?

A. Yes. Kaiser Gypsum Company, Celotex. I am not [2138] sure, then, whether it was a division of Jim Walter or not. I think it was.

American Gypsum Company. There was some board in there, I believe, shipped by Pabco Gypsum Division of Fibreboard out of their Colorado plant, although I am not real specific on that.

American Gypsum Company was active there. Texas Gypsum Company was active there. Dierks Forest Gypsum plant in Arkansas was active there.

Q. Johns-Manville?

A. I don't know. They could have been under a private label arrangement, but not as a manufacturer.

Q. Certain-teed?

A. Certain-teed was associated with Bestwall. I am not quite sure of the relationship but, yes, I think Certain-teed had a private label arrangement with somebody.

[2139] Q. How about Flintkote?

A. Flintkote was active; yes.

Q. Do you recall any others?

A. There may be some others, but I am speaking from memory, now.

Q. All right. You have mentioned 12 that were there in Dallas and Fort Worth.

A. Did I mention 12?

Q. Yes, sir.

A. I didn't count them, but, if I mentioned 12, I mentioned 12.

Q. Do you know another place in the United States where there are 12 plants, with still another one coming in, competing in a municipal area selling gypsum wallboard, other than Dallas and Fort Worth?

A. Yes.

Q. Can you name one?

A. Oklahoma City.

Q. I mean excepting the environs, the market——

A. Oh.

Q. —in the southwest.

A. I think all those companies would have been active in Denver, maybe, with the exception of Texas; all of those companies would have been active, I believe, in Kansas City.

[2140] Q. That is part of the market you described this morning; isn't it?

A. Yes. I think all of them would have been active in St. Louis. I know American was going in there heavily. Texas may not have been active in St. Louis. We were. I believe all the other companies were. Maybe not 12, but perhaps other markets where 9 or 10 were active.

There wasn't another place, really, where the—California market, where—let's see—I believe American shipped into California. We did. I believe Texas shipped into the California market.

Q. Do you have any idea how many plants are within this area you mentioned this morning, Texas, Oklahoma, New Mexico, Colorado, part of Nebraska, Kansas, Missouri—that you defined as the area you thought you were going to stay in as your principal market—do you have any idea how many gypsum plants are in that area?

A. Oh, there are a good many, I think. I could start naming them.

Q. Isn't it one of the most intensive conglomerates or collections of gypsum plants in the United States?

A. It is an intensive area. I wouldn't say it is one of the most, because I don't know that much, say, about the southeast.

• • • • •

[2168] Q. Did you not testify that the population in your principal marketing area was approximately 25 million; that would be within the red lined area.

A. No, I testified that within a 500-mile radius of Duke, Oklahoma, the population was approximately 25 million.

Q. Would that not encompass substantially——

A. Yes, sir, substantially all, but the calculation was done on the basis of the circles drawn around Duke, not by state.

It took counties within that circle and added up the populations, and it would encompass most of this area.

Q. Now, I think you also testified that another area within 500 miles of La Porte, Indiana, had 70 to 75 million people. Do you recall that?

A. Yes. The same calculation on the radius around.

Q. Where is La Porte County, Indiana?

I'm marking an "X" there.

Your 1964 SEC PROSPECTUS, Defendant USG Exhibit 66, pointed out, did it not, that the business of the company, the business you were about to engage in, gypsum wallboard, was, and I quote, "highly competitive"?

A. Yes, sir. That is correct.

Q. And did it not also say this about your competitive area, I quote, on page 12: "The business of the company is highly competitive. There are 13 other manufacturers of gypsum [2169] wallboard in the United States known to the company. Three of these companies sell a large majority of the market. Six of the present manufacturers have plants in Oklahoma and Texas."

Now, this is speaking as of two years before the date I asked you, a year and a fraction before.

> Six of the present manufacturers have plants in Oklahome and Texas. Since 1960 there have been substantial increases in plant capacity in the gypsum products industry involving at least 13 new plants or plant expansions constructed or now under construction.
>
> The company's competitors have the advantage of existing sales organizations and trade relationships with customers. The only established trade relationships that the company now has are those that have been acquired by the officers and management since 1960 for the benefit of the company.

Now, you read and approved that statement before it was filed with the SEC, did you not?

A. Yes. It is essentially the same statement as in our '67 PROSPECTUS, and essentially the same statement that, I guess,

is just about in any prospectus I have ever read about competitive activity.

Q. You mean '68 PROSPECTUS?

A. Yes. Well, it was begun in '67 and it was finalized [2170] in January, '68, yes, sir.

Q. And some of the numbers were slightly different in that, weren't they, than the ones I read?

A. I was speaking to the statement about competitive activity rather than to the numbers.

Q. You have been in an extremely competitive business, have you not, since you started production in 1965 and through your resignation as president in March, 1973?

A. Yes, sir, extremely competitive.

Q. Subsequent to January 1, 1965, when you began commercial production at Republic, was there not still another gypsum board plant built in your principal area?

Do you recall that? Do you recall that plant being built at West Memphis, Arkansas?

A. Oh, yes, a Texas Gypsum plant.

Q. I'll mark that competitive plant 18.

Where would West Memphis be?

A. Right there where your hand is.

Q. West Memphis?

A. Yes.

Q. I'm marking that 18 competitive plant.

Now, that plant was built by whom?

A. Texas Gypsum Company, Division of Temple Industries.

Q. And it became a multi-plant producer thereby?

A. Yes, sir.

• • • • •

[2175] By Mr. KECK:

Q. Would you tell me again what you mean by your testimony Thursday that the prices of your gypsum, Republic gypsum board competitors were always uniform?

A. If I remember the testimony correctly, we were talking about the period of the early '60's, prior or maybe during our plant start-up. As I remember it, it was when I was purchasing gypsum wallboard when I was at Avinger Lumber Company. Maybe there was other testimony about it. I don't remember.

Q. Can you date that?

A. That would have been the early '60's, yes, sir.

Q. Would that have been during the time when Texas Gypsum was competing?

A. A period of it would have—yes, yes, they came on-stream in the early '60's, so it would have been the same time.

Q. And you are saying it is your recollection that the prices of the gypsum board producers competing with Texas Gypsum were uniform?

A. To the best of my recollection, yes, sir.

Q. Were you talking about published prices or are you talking about market or transaction prices?

A. Well, in that period, in 1960, '61, and in that period, the published price was usually the market or transaction price. Then when, after we came on-stream, and let's say in the '60 period, there was more difference usually between the published price and the transaction price and the—well, that is as I remember it.

Q. Did you not identify a number of 1970 price letters for Mr. Fricano which indicated that from time to time, at least, even list prices were not uniform?

A. That is correct, yes.

Q. Do you recall testifying, do you know, that you thought gypsum board was a "commodity generic in nature"?

A. Yes.

Q. I assume you were talking about the bellweather or popular selling types of wallboard in making that statement?

A. Yes, the half-inch and three-eighths and five-eighths.

Q. You said it was like money, one dollar bill was like another.

A. Yes, that is what I said.

[2177] • • • • •

Q. You mentioned in the fall of 1965 you raised your price on fire-rated board. Didn't you testify about that?

A. Yes, that was a comment listed in our annual report, I believe in 1965, that related to an increase, and after reading that I remembered in very general terms an increase on fire-rated board as opposed to just the regular board, and I think there was an increase at that time. I [2178] know there was considerable difference, if I remember correctly, between fire-

rated board in the Texas-Oklahoma market than there was in California.

Q. In that instance, the other competitors matched that price and it became effective, did it not?

A. I don't remember whether Republic was the leader on that price or some other company was. I don't know. All I stated was that Republic experienced, and that was the statement written in the annual report. It has been so long ago, I don't have a recollection about it, but we made the statement in the annual report we had experienced the higher price on fire-rated board for at least a month, and I thought about that afterward and I remembered most of the products we were trying to ship to California at the time, we furnished five-eighths fire-rated board, because there was a significant difference in California on regular board and fire-rated than there was in Texas.

Q. There are other occasions, were there not, where your price, published changes in the form of an increase were not successful, is that not true?

Let me rephrase that.

There were other times when you published a price that was higher than your prior price, that did not stick, is that not true?

A. Yes, there were. I am sure there were other times.

• • • • •

[2181] • • • Q. And were not the market or transaction prices of gypsum wallboard that you testified to, like the actual selling prices of automobiles after rebates and discounts?

A. With the exception of the period during when high finished wallboard got down to $26 delivered or $25, whichever it was. I know Republic, we published the $26 as our listed price and we did not discount from it. If I remember correctly, the most—I think that U.S. Gypsum did the same thing. I think they had a published $26 price when it got down low, then at that point published price and the transaction prices were the same.

Q. That is not what I asked you and I will come to that.

But I asked you if it wasn't, if the market or transaction price of gypsum wallboard were not like the actual selling prices of automobiles after rebates and discounts.

A. That is what I was trying to answer.

Q. Can you say yes or no?

[2182] A. No.

Q. In what respect does it differ?

A. This difference was there was a period during which the market price and the list price were the same. I have never seen an automobile dealer, with the exception of maybe a Cadillac, that has sold his car at the sticker price. There is always a difference. I have never seen a period like happened in the gypsum industry, where the two came together and were the same for a while.

Q. Can you identify the time when they came together, as you have said?

A. If I remember correctly, that was in late '68, early '69. No, late '69 early '70, when we—I know when we published that increase to $36 and it was $26, Republic's published price was $26, and I believe, if I am not mistaken—I don't know that all the gypsum companies were that way, but I think U.S.G. was and I think maybe one or two others had a published price that was the same as the transaction price.

[2183] Q. Are you talking or referring to the April, 1970, published price?

A. Yes, that Republic put out.

Q. Isn't it a fact that, both before and after that time, your company were, on a transaction basis, meeting lower prices, as low as $25.50 or $28?

A. The published—Republic's published was $26. There may have been some accounts that were 50 cents to a dollar below that. Yes, sir.

Q. We will come to that. But, except for that isolated occasion, the transaction prices are like the wheeling and dealing actual prices paid for automobiles; are they not, the transactions?

A. Yes, when the transaction and the list price are different; that is correct.

• • • • •

[2217] • • • By Mr. KECK:

Q. Mr. Simpson, do you recall receiving a report from Arthur Young and Company in September, 1967, which Republic had requested, which pointed out that, in mid-1965—that is five years before the $26 price in 1970 that you testified about the other day—the price of gypsum wallboard in Dallas had dropped from $49 per M feet in 1961 to $28, and that was a result of 19 new plants having been constructed, five of which had been built by companies which were [2218] new to the industry, one of which was Republic?

A. Do I recall the report? Is that the question?

Q. Yes, sir.

A. Yes, sir. I do.

Q. Do you recall the report contained those statements?

A. Yes, I do.

Q. I show you Defendant's USG Exhibit 71 and ask you if you can identify that.

A. Yes, I can.

Q. Tell us what it is.

A. Republic Gypsum Company Feasibility Report for Calcining Expansion, dated 1967.

• • • • •

[2226] By Mr. KECK:

Q. Would you look at the year 1965 as shown on page 27 of Defendant USG Exhibit 69 and tell us what the gross sales of manufactured gypsum wallboard of Republic is shown to be?

• • • • •

The WITNESS. OK. We show our gross sales in 1965 for the period ending June 30, 1965—of a million one hundred twenty-two thousand dollars.

By Mr. KECK:

Q. And that is for what period, if you recall?

A. That would be for—I just stated—the 6-month period ended June 30, 1965, beginning January 1, 1965.

Q. And what were your pre-tax profits for that period?
A. We lost thirty-four thousand dollars.
Q. That's not correct; is it?
[2227] A. 1965?
Q. Your pre-tax profit was four thousand dollars; wasn't it?
A. No, sir. 1965 we had a loss of thirty-four thousand.
Q. You had a loss on lumber; didn't you? I am talking about the pre-tax income on manufactured gypsum wallboard. Isn't that shown in that 1973 Annual Report?
A. Just a minute, let me look. There is gross sales, net sales. It has gross sales by product. Here it is. I am sorry. Manufactured gypsum wallboard, four thousand dollars.
Q. So you operated in that six-month period at a profit?
A. In the six-month period, yes.
Q. All right. Now, what were your manufactured gypsum wallboard sales in 1966?
A. Three million, three hundred and sixty-three thousand.
Q. And what was your pre-tax income?
A. Well, this twenty-seven thousand dollars—these figures are after the amortization, you understand, of that three hundred thousand start-up, the loss in that first four months we had.
Q. Now, this 1966 figure is for one full year ended June 30, 1966; is it not?
A. Yes, that's correct.
Q. So you operated at a loss that year?
[2228] A. No. We operated at a profit that year.
Q. A profit, pre-tax profit of twenty-seven thousand.
Now, what did you do in the year ended June 30, 1967?
A. Well, that's the first year we had good prices all year. It is the first year we really made any money.
Q. I asked you what were the sales?
A. Five million, two hundred and fifty-four thousand.
Q. What was the pre-tax profit?
A. Four hundred and nineteen thousand.
Q. Now, the year ended June 30, 1968. What were your gross sales of manufactured gypsum wallboard?
A. Five million, eight hundred and sixty thousand dollars.
Q. What were your pre-tax profits?

A. On gypsum, five hundred and seventy-nine thousand dollars.
Q. Do you have any idea what the percentage pre-tax profit is on sales in that year?
A. Well, that's roughly 10 per cent pre-tax, 5 per cent after-tax.
Q. Now, refer to the year ended June 30, 1969. What sales did you have in that year of gypsum wallboard?
A. Sales increased to six million, one hundred and fifty-five thousand dollars.
[2229] Q. What were your pre-tax profits?
A. Profits dropped to less than half, two hundred and sixty-one thousand dollars.
Q. In 1970 what were your gross sales of manufactured gypsum wallboard?
A. Sales dropped about a million dollars to five million one hundred and twelve thousand.
Q. And you had what kind of a pre-tax profit or loss?
A. We lost six hundred and ninety-five thousand dollars pre-tax.
Q. What were your gross manufactured, gypsum manufactured sales in the year ended June 30, 1971?
A. Five million four hundred and twenty-seven thousand dollars.
Q. And what was your pre-tax profit or loss?
A. The loss was two hundred and seventeen thousand dollars.
Q. Now, for the year ended June 30, 1972, what were your gypsum wallboard sales?
A. Seven million eight hundred and forty-six thousand dollars.
Q. What was your pre-tax profit?
A. Seven hundred and twenty-three thousand dollars.
Q. Now, for the year ended June 30, 1973, what were your sales, gypsum sales?
[2230] A. Twelve million, one hundred thirty eight. I believe that included Rosario at that point.
Q. What was your pre-tax profit?
A. A million and thirty-three thousand dollars.

Q. Now, I show you what has been marked Exhibit 72 and ask you if the figures that you have read off are not the top-appearing figures in every case?

A. The top-appearing figures here is the sales.

Q. And also pre-tax profits?

A. And the second line is pre-tax profits, yes, sir.

Q. And then below that a calculation is made of pre-tax profits as a percent of sales; is it not?

A. Yes, sir. Yes, that's correct.

Q. And does it not show simply from a mathematical calculation you had a total in eight and a half years of fifty-two million fifty-seven?

A. That's correct.

Q. And a total pre-tax profit of two million one?

A. That's correct.

Mr. KECK. I offer in evidence Defendant USG Exhibit 72.

Mr. FRICANO. We assume the arithmetic is right, Your Honor. No objection.

The COURT. It is admitted.

• • • • •

[2284] Q. Thank you. During your examination by Mr. Fricano, you explained, as I understand it, this process where you would call a competitor to determine whether or not a report which you had received from the field was accurate about the price that competitor was said to have offered to someone whom you or Republic was trying to sell. Do you remember that testimony?

A. Yes.

Q. And, due to that, did you call your competitor every time you got a report from the field that a lower price had been offered to a company to whom you were trying to make a sale?

A. Not every time; no.

Q. Did you do it just on those occasions when you weren't sure that the report was reliable—the reports you got from your salesmen?

[2285] A. Generally, it would be when I wasn't too sure about whether the price actually existed or not.

Q. So you weren't sure whether the customer was telling your salesman the truth when he said he had an offer of a better price from somebody else?

A. A customer or maybe even my salesman, sometimes.

Q. The salesman is anxious to make sale and a commission, too, isn't he?

A. Yes, sir.

Q. So, for both of those reasons, you wanted to pass on whether or not you would meet the offer, and if you had doubts about the claim that was made by the customer or the salesman, in some cases, you called the competitor to verify it?

A. That is correct.

Q. And if, on that call, you found that, indeed, the report coming to you through the field that there was a lower price that had been offered to somebody—you found that that was true, then you customarily met the price; is that right?

A. Yes.

Q. That was if you found there was a lower price that had been offered to one of your customers, you would meet the lower price?

A. Yes. Generally, that would be true, 90 percent of [2286] the time, perhaps.

Q. And I think you indicated that, if you dropped the price to one customer, this often had the effect of spreading to other customers in his area; is that not right?

A. Yes, that is correct.

Q. Once you dropped it to one and, you said, particularly a larger customer, would tend then to cause the price level to erode in that area?

A. That is correct.

Q. And, indeed, you indicated that, with reference to Fort Worth and Dallas, if the price dropped in Dallas, pretty soon it would drop in Fort Worth, or vice versa—I can't remember which way you put it. Do you remember that?

A. I don't remember. I think it was drop the price in Fort Worth and it might have an impact on Dallas; but it makes no difference.

Q. You would expect, if you dropped it in Fort Worth or Dallas, whichever, it will tend to spread to the adjacent community?

A. That is correct.

Q. Now, if you had one of these reports that a lower price had been offered to one of your customers or potential customers, and you called a competitor because you doubted either the customer's or the saleman's word, you called the competitor to see if this claimed lower price was [2287] true, and your competitor says, "No, I didn't make such an offer," what would you do then?

A. I would not—you know, say I would not meet the price, that doesn't mean there might not have been a time, two or three days later, I might not have called—might have another report from the same account, for example, and somebody else had offered a lower price, and then I called to confirm it.

Q. Right.

A. So, you know, it could have worked both ways. Generally, you would not—if you got an answer, no, the price was not in existence, generally you would not meet that price.

• • • • •

[2297)] By Mr. DeLone:

Q. Mr. Simpson, do you recall that during the course of your direct examination by Mr. Fricano he asked you if any of the officials of the defendants made any comments to you concerning Republic supplying extra wallboard with orders they were selling to customers and initially you said that you didn't have any recollection on that score. And then Mr. Fricano asked you to look at a document, which is the one I have here marked Court Exhibit 2, and after looking at that document, you then indicated that you did have a recollection just that it was that you had received comments on that score from Mr. John Brown of National, Mr. Watt of U.S. Gypsum. And then subsequently, I think right at the beginning of the afternoon you said you wanted to make a further correction of your testimony in that regard and you alluded to your testimony that you had given earlier and said, "I made a statement and I would like to clarify it concerning the question from Mr. Fricano about whether I had an exchange with Mr. Watt and Mr. John Brown concerning dunnage and I was asked a question. I did not remember it."

And then you went on and you said, "I do not have a recollection at this point of any conversation with Mr. Watt about dunnage. I just don't have that recollection at this point."

That was, as I remember it, the last of your [2298] testimony on that score.

Do you have a recollection of a conversation with Mr. John Brown about dunnage?

A. Yes.

Q. You do?

And was that recollection refreshed by the document that Mr. Fricano showed you?

A. The thought process I went through subsequent to reading the grand jury testimony—in the first place, as I said, as part of that correction, my contact with Mr. Watt was very limited. I had much more contact with Mr. John Brown. Over the period of time I was asked more questions by Mr. Brown or asked more questions of Mr. Brown. And, to the best of my recollection, although as I stated also, dunnage was not a big subject for conversation, and the best of my recollection was there was a conversation with Mr. Brown about dunnage, Mr. John Brown.

• • • • •

[2300] • • • Q. Now, you had a number of conversations—Mr. John Brown is dead. You know that, don't you?

A. Yes.

Q. You had a number of conversations with Mr. John Brown, for instance, beginning back in 1964, '65 and '66 about whether you would purchase paper from National Gypsum, didn't you?

A. Most of those conversations were with Mr. Atwell, rather than Mr. John Brown.

Q. Did you ever have such conversations with Mr. John Brown?

A. Yes, I did.

Q. Did you have them at Gypsum Association meetings?

A. At Gypsum Association meetings and on the phone and with Mr. Atwell, anyway, I remember in the National Gypsum

[2301] office and in our office as well.

Q. Did you also have conversations with Mr. John Brown about National supplying you with special types of paper, plaster, lath?

A. Special types of paper, yes. Plaster, yes. Attempted to purchase pre-decorated board, had conversations about that, about that pre-decorated board under a private label, although we were never able to do that. Conversations about lath, I don't remember.

Q. Did you also discuss with Mr. Brown the possibility of your being licensed under National's fire shield wool board patent?

A. Yes, I think we talked to the National and U.S.G. and we subsequently licensed under Bestwall or Georgia-Pacific.

Q. Some of these conversations with Mr. Brown took place at Gypsum Association meetings?

A. Yes, sir.

Q. Were they private conversations you had with Mr. Brown?

A. Yes, they would have been. Yes, they were private conversations.

Q. If someone else came up and joined you, you would have stopped the conversation?

A. More than likely, yes.

Q. Now, you didn't have facilities for making your [2302] own board paper, as I understand it?

A. That is correct.

Q. So we know what we are talking about, the board paper is what is on the outside of this exhibit, Government Exhibit 1?

A. That is correct, both sides of it.

Q. Both sides.

And the gypsum is, in effect, sandwiched between the paper?

A. Yes, sir.

Q. And you initially decided to buy your supply of wallboard paper from a concern in Denver, is that right, Packaging Corporation?

A. One of their plants was in Denver.

Q. And National Gypsum had a plant in Pryor, Oklahoma, did they not?

A. To be very clear about that, we bought from Packaging Corporation of America in two plants, one in Hutchinson,

Kansas and one in Denver, Colorado and one time out of the Quincy, Illinois plant.

Q. With reference to National Gypsum's plant, that is in Pryor, Oklahoma?

A. That is right.

Q. Can you indicate where Pryor is in relation to your Duke plant?

[2303] A. Just east of Tulsa.

Q. And your Duke plant is down where that circle is?

A. Yes.

Q. About how far is the distance?

A. I guess the distance to Pryor is about the same as to Wichita, maybe 250 or so, 275. I am just guessing, now.

[Proceed to next page—no loss of context.]

[2304] Q. And then, about the end of 1970, if I understand your testimony correctly, you had some difficulties with your paper supply from Packaging Corporation because you owed them too much money.

A. That's right.

Q. Like about $375,000.

A. That's right.

Q. And, at that juncture, did you then take up again whether National would supply you with paper?

A. Yes, sir. That is correct.

Q. And did National supply you with paper from its Pryor plant?

A. Yes, they did.

Q. And would you turn those papers over that are right there before you now? I think you can get rid of Court Exhibit 2. We don't need that any more.

You have before you Defendant National Gypsum Exhibit No. 1, a letter from Atwell of National Gypsum to you, of December 22, 1970, enclosing an agreement with reference to the purchase of paper.

Do you recall receiving that document?

A. Yes.

Q. And that was the proposed agreement regarding the sale of all your requirements for paper used by you in the manufacture of gypsum wallboard, as indicated on the first [2305] page; was it not?

A. Substantially all, I believe. I think there was a 95 percent clause, if I am not mistaken.

Q. So you could buy five percent from someone else?

A. Or maybe that was the PCA contract. I don't remember.

Q. I think, if you will look at the second document, National Exhibit 2, December 31, 1970, you will see that that is the response that Mr. Henry sent to Mr. Atwell.

Do you have that before you?

A. Yes, sir.

• • • • •

Q. You will see, there, you reserve the right to buy [2306] five percent of your requirements from some other supplier; is that right?

A. Yes, sir.

Q. And you will also see there that a condition of the agreement which—who is Mr. Henry?

A. Mr. Henry, as stated on the letter, was executive vice president of Republic Gypsum Company.

Q. And he insisted on an extension of credit of 60 extra days and line of credit up to $350,000; did he not?

A. That is correct.

Q. And National extended credit to you on that basis; did they not?

A. That is correct.

Q. And I call you attention to Defendant National Gypsum Exhibit No. 3, letter of January 5, 1971, from Mr. Barber, general credit manager of National Gypsum, to your brother, Phil, with a copy to you. That outlines, does it not, the terms of this extension of a $350,000 line of credit and an extra 60 days or extended term for an extra 60 days?

A. Yes, sir. Yes, sir.

Q. And Mr. Barber is dead, too; you know that, don't you?

A. No, I did not.

Q. And then——

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[2307] Q. Now, you have before you, also, Defendant National Exhibit No. 4, a letter from Mr. Barber to your brother, Phil, with a copy to you; do you not, sir?

A. July 12?

Q. Yes.

[2308] A. Yes.

• • • • •

Q. And in that letter, it was just inquiring whether [2309] you could do anything to reduce this $350,000 line of credit; wasn't it?

A. [Nods head.]

Q. You would have to answer verbally, so the reporter can take it down. You nodded your head.

A. Oh, yes. I am sorry.

Q. And you responded to Mr. Barber in your letter of July 23, 1971, which is National Gypsum Exhibit No 5; did you not?

A. Yes.

• • • • •

Q. And there, you said to Mr. Barber, the general credit manager of National Gypsum, "We are grateful for your financial support during these trying times, and we appreciate the courtesy of your letter."

"We would like to reduce the size of our line of credit with you, but we do not feel we are in a position to [2310] do so now."

You wrote that to him; did you not?

A. Yes, sir.

Q. And you were grateful to National for accommodating you in this?

A. Very grateful; yes, sir.

Q. And you indicated you weren't yet able to do anything about reducing the line of credit; and did National Gypsum go along with your suggestion?

A. It is my recollection that they did go along with it; yes, sir.

Q. Well, your recollection—look at Defendant National Gypsum Exhibit No. 6, which is Mr. Barber's letter back to you of August 9, 1971. Do you have that before you?

A. Yes, sir.

• • • • •

[2311] Q. Now, in August, after you wrote you weren't in a position to reduce the line of credit, Mr. Barber wrote back to you, did he not:

"Dear Mike—" and I am not reading the whole thing, but just this—"Yes, we do understand your continuing tight fi-

nancial condition and recognize the plans you have made to improve this situation during the coming months. With this in mind, we are establishing April, 1972, as the [2312] target date for review of our present program, with the hopes of being able to reduce or eliminate the additional 60 days at that time."

You did receive that letter from him; did you not?

A. Yes, sir; that is correct.

Q. And then, come March 28, 1972, in Defendant National Gypsum's Exhibit No. 7, you wrote back to Mr. Barber—because April '72, had been set as the time for reviewing this again, you wrote him back again on this subject, at that time; did you not?

A. Yes. I did.

Q. And you said, "Before I outline—" among other things in your letter—"Before I outline our proposal, however, I would like to take the opportunity to thank you and your company for the financing help provided by the extended terms. Further, the cooperation given us by your Pryor personnel has made the business relationship with your company very easy."

You did write that to him; did you not?

A. Yes, I sure did.

Q. And you meant it, of course?

A. Yes, sir.

Q. And, finally, in October of 1972, when you wrote to Mr. Hayes, the president of the Building Products Division of National Gypsum, in Defendant National Gypsum's Exhibit [2313] No. 8, by that time, you were in a position to no longer expect special financial accommodations from National Gypsum; isn't that correct?

A. That is correct; yes, sir.

Q. And so you advised him: "We have determined that we will be able to discontinue the extended terms on purchases after November 1, and we will be able to pay them on your ordinary net terms. Your cooperation during the last several months in granting us special terms has been very much appreciated. It was quite helpful to us, and I want you to know that all of us are grateful for the help that you and your company gave to us."

• • • • •

[2314] By Mr. MELLOTT:

Q. ——.

Mr. Simpson, you have testified here on direct examination by Mr. Fricano concerning certain price verification discussions which you had with your competitors concerning after-the-fact price exchange; is that correct?

A. Yes, sir.

Q. Now, Mr. Simpson, is it also correct that you had very few such verification conversations with Georgia-Pacific subsequent to 1966 because Georgia-Pacific had a practice of just dropping the price in a given area, and it was very obvious to you what was going on, and therefore these verification calls were not necessary?

A. There were much fewer contacts with Georgia-Pacific Corporation than there were subsequent to that period. [2315] I mean, there were with others, yes.

Q. Well, have you testified—as I have just stated in my question—in sworn testimony prior to today?

A. To the best of my recollection I have, yes, sir.

Q. So what I said was correct?

A. Yes. To the best that I recollect, yes.

Q. All right, sir. Am I also correct, Mr. Simpson, that by 1968 you were not having any verification communications with Georgia-Pacific for the reason that it was not necessary because you knew they were one of the companies that would take the price down, and it was so obvious to you what was going on that you did not need to confirm with Georgia-Pacific?

A. That's exactly right. Because the price was being dropped by Georgia-Pacific in our prime market, yes.

• • • • •

[2321] • • •

By Mr. MELLOTT:

Q. Mr. Simpson, when we have, as I have read, one-quarter, $23, how do you understand the $23 to be applied?

A. Per thousand square feet.

Q. Per thousand square feet. All right, sir.

Now, continuing to read: "Five-eight, $37.75."

"One-half, Type X, $37.50."

"Five-eight, Type X, $42."

What did you understand "Type X" to be referring to?

A. Fire rated wallboard.

Q. All right, sir, and were you on March 18, 1970 also making Type X, fire rated wallboard?

A. Yes, sir.

Q. And was that under a patent license from Georgia-Pacific?

A. Yes, it was. I testified to that earlier.

Q. All right, sir. Continuing with the letter, "One-half inch or one-half, gypsum sheathing, $37. A few of the dealers quoted this price by Georgia-Pacific are Driskell Lumber Company, Berry Street Lumber Company, Travis Lumber Company and R. J. Teague Lumber Company. It is my [2322] recommendation that effective immediately we meet this competition."

• • • • •

[2359] Q. Mr. Simpson, you previously mentioned during your testimony here in this case that Republic Gypsum Company had a patent license for fire-rated board or Type X board from Georgia-Pacific, is that correct?

A. That is correct.

Q. Am I also correct that on various occasions over the years Georgia-Pacific furnished Republic Gypsum improved formulas, specifications, ingredients and suggestions with reference to the manufacture of an improved fire-rated board?

A. Part of our agreement was with Georgia-Pacific, that we would be provided this, pursuant to the licensing agreement.

Q. And they did do that?

A. Yes, they did.

Q. During the years?

[2360] A. That is correct.

Q. And is this fire-rated board the type of board that is used to protect from fire, the type that we saw in the film that you referred to in your direct testimony?

A. I referred to a film, I believe, on a fire-block membrane. I believe the fire-block membrane was marketed as a Type X board. I am not sure of that. If it was then, the answer is yes.

Q. In any event, the fire-rated board is a board designed to protect fire from going through the board, is that correct?

A. Yes, sir.

Q. Did Republic Gypsum manufacture that board?

A. Yes.

Q. Mr. Simpson, I have on the witness stand a document which has been markd for identification Georgia-Pacific Exhibit 210. Would you look at that document, please, and tell me, if you can, what that document is?

A. It is a letter dated November 18, 1966, to Republic Gypsum Company, Lubbock, Texas, Attention Rhyne Simpson, Jr. from Mr. Robert Smith, Division Counsel.

Q. Do you know who Mr. Smith was?

A. It is attached to a Georgia-Pacific Corporation letter to licensees of the various patents. He was counsel, I guess, for Georgia-Pacific.

[2361] Q. He did from time to time forward you information concerning improvements with reference to the manufacture——

A. Oh, yes.

Q. —of fire-rated board?

A. Oh, yes, over the years we got that.

Q. Do you remember receiving the original of this letter with the attachments?

A. Not this specific letter, no, sir. I am sure I did, though.

• • • • •

[2365] Q. Mr. Simpson, I believe you referred, in fact, I am certain you referred in your prior testimony to the plant Republic Gypsum had at Duke, Oklahoma.

A. Yes, sir.

Q. And the gypsum plant of Georgia-Pacific in Acme, Texas, I believe you stated those plants were about 40 miles apart, is that correct?

A. Yes, sir.

Q. Now, are you aware that on various occasions after Georgia-Pacific first entered the gypsum business in May, 1965, that periodically the plant manager of the Republic plant at Duke, Oklahoma would request Georgia-Pacific, at its Acme, Texas plant, to supply certain materials needed by Republic at its Duke plant for the manufacture of gypsum?

A. Yes, we shared. We would exchange paper, perhaps some other products, starch. One plant would get low or a [2366] shipment was late coming in and it was not uncommon to exchange a roll of paper or a few pounds of starch.

Q. So Georgia-Pacific worked with you supplying your needs?
A. Correct.
Q. And you worked with Georgia-Pacific supplying their needs?
A. Yes.
Q. As you needed them at your particular plants?
A. Yes.
Q. And that included not only paper, but such other raw materials as starch and vermiculite?
A. Yes.

• • • • •

[2374] By Mr. McSweeney:
Q. Now, Mr. Simpson, among the investors who helped your company, Republic Gypsum, get off the ground was the Celotex Corporation; isn't that correct?
A. I am not sure in which name it was carried. It was either Celotex or one of the divisions. I think it was the Big Horn Division of Jim Walter Corporation. I am not sure whether it is a division of Jim Walter Corporation or part of the Celotex Corporation. But there was an investment, yes, sir.
Q. Well, I will show you documents then that may help refresh you on that. Would you take from that group of exhibits, please, Defendant Celotex Exhibit 2. You might also look at Exhibit 1, if you would, Mr. Simpson.
What is Defendant Celotex Exhibit 1, sir?
A. It is a letter on Celotex Corporation letterhead to Republic Gypsum Company dated May 20, 1971. Attention, Rhyne Simpson, Jr. From Richard Thompson, Vice President.
Q. Did you receive that letter, sir?
A. Let me look at it for a second.
Q. Sure. Take your time.
A. Yes, sir, that's correct.

• • • • •

[2375-A] Q. Now, does that assist you in recalling that the stock was held by Celotex Corporation?
A. At that point, I believe it was held by Celotex, but the original sale was carried in the name of Big Horn Gypsum Company.

Q. Big Horn—excuse me.
A. Well, this was when Celotex was attempting to sell it to us—stock.
Q. Yes. Big Horn Gypsum Company was a subsidiary of Celotex; was it not?
A. I don't know whether it was a subsidiary or a division.
Q. You don't know?
A. No, sir. I do not know.
Q. You know it was affiliated in some way?
A. Yes, it was owned by Celotex.

• • • • •

[2376] Q. Well, then, Mr. Simpson, Celotex or Big Horn is one of the investors which did assist Republic Gypsum in its early days in getting off the ground by making an investment it it; did it not?
A. They purchased some preferred stock on this original preferred stock offering, which we had the prospectus here yesterday, at the same time that we started selling wallboard to Celotex, and, ostensibly, to help us finance working capital attributable to that, to that agreement, the inventory and receivables that we would carry.
Q. And that helped you get off the ground, didn't it?
A. Yes, sir.

• • • • •

[2378] • • •

Q. Mr. Simpson, would you please look at Defendant Celotex Exhibit No. 3? Can you state what that is, sir?
A. It is an agreement dated October 1, 1964, between Republic Gypsum Company and the Celotex Corporation, concerning the sale of gypsum wallboard to Celotex by Republic.

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[2379] • • •

By Mr. McSweeney:
Q. Now, I believe you testified, on your direct, that you did have what you call some buy or—not buy and sell, but some sell—a sell agreement to Celotex; is that right?
A. Yes.

Q. That is to say, you sold wallboard to Celotex?

A. It was not an exchange agreement of footage for footage, but it was a sale to—an agreement to sell to Celotex certain footages of wallboard.

Q. Yes; and, pursuant to that agreement, in fact, you did sell wallboard to Celotex, did you not?

A. Yes.

[2380] Q. Do you know what your volume of sales were, either in dollars or thousands of square feet, over the years?

A. No, I do not.

Q. Well, would you consult——

Mr. McSweeney. May we have, please, Defendant U.S. Gypsum Exhibit 71?

By Mr. McSweeney:

Q. Mr. Simpson, in that, there is a schedule, which I believe you consulted the other day, one page of which purports to show sales of what you, I think, called private label sales to the Celotex Corporation.

Do you find that, sir?

A. I think this is the chart I was looking at.

Q. Yes, sir. Do you have in front of you the page which is headed, "Republic Gypsum Company historical and projected sales analysis in total dollars"?

A. Yes, sir.

Q. And under a heading of, "Private Label Sales to:" you find the Celotex Corporation?

A. Yes.

Q. Now, is that expressed in thousands of dollars?

A. Yes, it is.

Q. Would you just tell us, please, how many thousands of dollars were—sales there were, according to this computation?

[2381] A. "In fiscal 1965, $156,000; in fiscal 1966, it went up to $667,000." I believe that was the year your Fort Dodge plant was on strike, and we shipped large quantities to there, to that market area, and the next year, it dropped back to—in 1967, it dropped back to $147,000.

Q. Yes, sir.

A. And then we had projected for 1968, $34,000, and none thereafter.

Q. But it doesn't show in this report whether, in fact, there were any sales after your fiscal year 1967; does it?

A. No, it does not. I think there were, but I don't remember.

• • • • •

[2382] Q. Those sales that you made to Celotex in those early years also helped you get Republic Gypsum off the ground and going; did it not?

A. Yes, it did.

• • • • •

[2383] • • •

Q. I see. Well, sir, may I call your attention, if you would, to Defendant Celotex Exhibit 6?

A. Yes.

[2384] By Mr. McSweeney:

Q. Does that refresh your recollection as to whether you did or did not have a buy-sell agreement with Celotex?

A. It appears we did out of the Hamlin plant. I don't think we bought any board pursuant to it.

Q. The fact is you had an agreement, did you not?

A. It appears we did, yes.

Q. And under it you could have bought from Celotex from its Hamlin plant, if you wanted to, could you not?

A. That is correct. I was mistaken on that.

Q. You can identify that, or can you say—

A. Yes.

Q. Can you say what that agreement is, sir?

A. It is an agreement between Republic Gypsum Company and Celotex to purchase wallboard at the Hamlin plant signed by Burnette Henry of Republic Gypsum Company.

Q. Who was your Vice-President?

A. Yes.

Mr. McSweeney. I offer Defendant Celotex Exhibit 6.

• • • • •

[2403] By Mr. Bartlit:

Q. Now, you have testified that you knew when you went into this business that there was a heavy concentration of competitors down there in your prime area, Mr. Simpson, right?

A. I believe we talked about that, yes, sir.

Q. And you knew that you were the last competitor to enter the area; all the others you have talked about were already there when you moved in, weren't they?

A. I believe that's correct, yes, sir.

• • • • •

[2406] • • •

Q. Incidentally, you talked about break-even points, Mr. Simpson.

During this period of time, whether you sold below your break-even point or above your break-even point, you got paid, didn't you? You got paid your salary, right?

A. Yes. I always got paid my salary. All employees did.

Q. Now, you testified, I believe, and the record shows that by the year 1972 you made over $700,000 profit, right?

A. Fiscal year '72. June 30 '72. I don't remember the exact figure.

It would have been around in that area for the gypsum division, yes, sir.

Q. And the next year, 1973, you made over a million dollars' profit?

A. I believe that's correct. Yes, sir.

Q. Now, you also testified that back in 1970 you had a $700,000 loss. Do you recall that testimony?

A. Yes, sir, I do.

Q. Now, isn't it a fact that in 1972, the year you made $700,000 that was a record year for housing starts in this country?

[2407] A. 1972. Was that the year it hit two million four or two million five?

Q. Yes, sir.

A. Yes, that would have been the year, but our fiscal year is six months off from the calendar year, so you would need to compare housing starts during the fiscal year rather than calendar year.

Q. And it is a fact, isn't it, that when housing is starting up, there is more of a demand for wallboard?

A. That's a fact, yes, sir.

Q. And you would expect, then, the prices to go up, isn't that right? Demand increases. Wouldn't you expect that people would want the product more and the prices would go up?

A. That's what you should expect, yes.

Q. And you would expect that you would make more money?

A. If the price went up and if you sold more wallboard, you would expect to make more money, yes.

Q. And isn't it true, Mr. Simpson, that back in 1970, the year that you lost $700,000, there were almost a million less housing starts then there were in 1972, when you made money?

A. If I remember correctly, there were three years in a row with about level housing starts, and I think that was '68, [2408] '69, and '70, around a million five, and that in 1970 we had about the same housing starts as the two previous years.

Q. So you had a million housing starts less when you lost money than you did when you made $700,000, right?

A. If that's what the two figures subtract out to be, that's right.

Q. And isn't it also—strike that.

You have testified, Mr. Simpson, that you kept up on what was going on in the industry.

A. The best I could, yes, sir.

Q. And isn't it true that in 1970, when you lost money, others of your competitiors didn't have very good years either?

A. They were making money is what I testified to.

Q. But didn't they have a lot worse years than they had been having before or since?

A. But the point is they were making money.

Q. Will you answer my question, please, Mr. Witness?

A. The answer is yes. They dropped from the previous year.

• • • • •

[2415] • • •

Q. Isn't it a fact that by the time Mr. Montgomery took over the duties of verifying, you were no longer verifying prices with U.S. Gypsum?

A. I don't remember when verification stopped with U.S. Gypsum. I remember it stopped. I don't remember the exact date, though, as it relates—I know I went to the mobile home plant full time in 1970, mid-1970, and I think it was before that that Mr. Montgomery had the responsibility of signing off. I don't remember the exact date, sir.

• • • • •

[2416] Q. Let me show you Court Exhibit 2, Mr. Simpson, and ask if that refreshes your memory that at the time Mr. Montgomery started handling verification, you were no longer verifying with U.S.G.

Mr. BARTLIT. That is page 357, Mr. Fricano.

By Mr. BARTLIT:

Q. Does that refresh your recollection?

A. Yes, it does.

Q. It is a fact, isn't it, by the time Mr. Montgomery started handling verification, you weren't verifying with U.S.G. any more?

A. I believe that is correct.

Q. Now, in your direct examination, Mr. Simpson, you testified about a conversation with Andrew Watt at the first Gypsum Association meeting you attended, the first one you ever attended, October, 1964, in Colorado Springs. Do you recall that?

A. Yes.

Q. And the record shows, the transcript shows you thought or recalled Mr. Watt said, "You will be asked questions. Be honest."; that it was a short conversation, and that you had only one private conversation at the Broadmoor. Do you recall that?

A. Yes.

[2417] Q. Isn't it a fact, Mr. Simpson, that—let me back up a second.

We are sympathetic to you, because 1964 is 13 years ago, 11 years ago.

Mr. FRICANO. If Your Honor please, I object.

Mr. BARTLIT. Let me ask this question——

The COURT. I gather what you are saying is that you understand a good bit of time has passed?

Mr. BARTLIT. Yes, sir.

By Mr. BARTLIT:

Q. Isn't it a fact that at the time of your Grand Jury testimony, back in December, 1971, you had no recollection whatsoever of Mr. Watt being involved in any conversation like that?

A. I don't think that is right.

Q. Isn't it a fact that back in 1971, at the time of the Grand Jury, you recalled a different man being involved in such a conversation, not Mr. Watt?

A. I testified that I had contact with Mr. Gimlin and Mr. Watt of U.S. Gypsum.

Q. I don't want you to be confused. We are talking about the October, 1964, Broadmoor meeting. We are not talking about subsequent telephone calls or verification calls, only the Broadmoor.

[2418] A. You are talking about the Broadmoor.

Q. And you said when Mr. Fricano asked you, you had one conversation only, one private conversation at the Broadmoor, and that was with Mr. Watt, and he said, "You will be asked questions. Be honest."

That was your direct testimony.

A. Then last week you are talking about?

Q. Yes, sir, last week.

A. That is the way I remember the testimony, yes, sir.

Q. Now my question is that isn't it a fact that at the time of the Grand Jury back in 1971, that was not your recollection?

A. I don't remember, sir.

Q. Do you recall before the Grand Jury being asked these questions and giving these answers?

Page 304, line 23.

Can you recall precisely when and where those first overtures were made concerning these requests for price information?

Answer: The first time I had a question asked me on a specific, I cannot remember specifically what it was, but the first time it happened was at the first Gypsum Association meeting I went to in October, 1964.

Question: Do you remember who made this?

[2419] Answer: It could have been one or two or three people. It could have been—probably Mr. Brown of National Gypsum Company. And then I had some telephone calls from him in addition to that at the meeting.

Question: Is that Mr. John Brown?

Answer: Yes.

Did you so testify?

A. I did, if that is my testimony, yes, sir.

[2420] Q. And was that your best recollection at the time?

A. Yes.

Q. Now, you previously testified—and very frankly and candidy, Mr. Simpson—that——

Mr. FRICANO. If Your Honor please, I object——

Mr. BARTLIT. Your Honor, that is a proper question.

Mr. FRICANO. I object to the form of the question.

The COURT. You shouldn't characterize the form of the testimony.

Mr. BARTLIT. I think Your Honor will see where the question is going.

The COURT. Don't characterize it as frank or candid or having a lack of candor or lack of frankness.

By Mr. BARTLIT:

Q. During your examination, at one point, you said Mr. Watt had discussed free dunnage or extra wallboard with you. Do you remember that?

A. Yes.

Q. And then you came in here that afternoon, and you said you thought long and hard about it, and you didn't have such a recollection.

[2421] A. Right.

Q. Now, what I am asking you, Mr. Simpson, at the time of the Grand Jury, you didn't have any recollection of Mr. Watt at the Broadmoor; right?

A. No. I had recollection of Mr. Watt being at the Broadmoor.

Q. But you didn't have any recollection of him making a first contact with you regarding price verification; did you?

A. My recollection at this point is that he did say something to me about it.

Q. Well——

A. That is the way I testified last week.

Q. I understand that, but, at the time you were asked that question before the Grand Jury, you didn't say anything about Mr. Watt, did you? It was Mr. Brown; right?

The COURT. Now, look. The jury has heard that, and they have heard what he had to say, and they can interpret it as they see fit.

By Mr. BARTLIT:

Q. At the time of the Grand Jury, back in December of 1971, you didn't know that Mr. Watt would be a defendant in this case, did you?

Mr. FRICANO. Objection, Your Honor.

Mr. BARTLIT. That is a legitimate [2422] question, Your Honor—cross examination.

Mr. FRICANO. He says it is legitimate. I assume it must be legitimate, whatever Mr. Bartlit says.

Mr. BARTLIT. This is cross examination, Your Honor.

The COURT. Well, of course, prior to the return of the indictment by the Grand Jury, nobody would know who was going to be a defendant, so I don't know the point of the question.

Mr. BARTLIT. Well, the point of the question is clear, Your Honor. He testified one way then and one way now.

The COURT. Now, wait a minute. That is not at all clear. That is why I stopped you and said it was for the jury. It wasn't at all clear to me, and that is why I said it was for the jury.

By Mr. BARTLIT:

Q. Did you subsequently, during the period of time between your December, 1971, Grand Jury testimony and your testimony here today, learn that Andrew Watt was a defendant in the case, Mr. Simpson?

A. Yes.

Q. And who did you learn that from?

A. The Wall Street Journal.

[2423] Q. Did Mr. Fricano or Mr. Thorson ever tell you that?

A. I learned it from the Wall Street Journal.

Q. Now, it is a fact, isn't it, Mr. Simpson, that there came a time when you called Mr. Watt, and he told you that USG would no longer verify price with you?

A. Yes, that happened.

Q. And you understood, at the time, didn't you, that Mr. Watt was no longer verifying price with anybody?

A. Yes, I understood that.

Q. And that was back in—when, 1968, to your recollection?

A. I don't remember. It was some time prior to the 1970 period when Mr. Montgomery came into the picture.

The COURT. Now, before you go ahead, I want to make something as clear as I can to the jury.

When I said the matter was for you to determine—you heard testimony that was offered before the Grand Jury. You have heard testimony that was offered here. Whether those things contradict each other or not is for your decision and not for anybody else, and any comments counsel makes on it or any comments I make on it, if I do, have no bearing whatsoever, except I have a right to make the comment, but the decisions are entirely for you, and you [2424] alone.

By Mr. BARTLIT:

Q. With regard to your call with Mr. Watt, when he said he was no longer verifying, Mr. Simpson, I would like to ask whether, before the Grand Jury, you were asked these questions, and whether you gave these answers.

Mr. BARTLIT. Page 357, line 13, Mr. Fricano.

> Question: Did anyone in USG say to you that they were stopping, or did they just cease replying?
>
> Answer: If I remember correctly, there could have been a telephone conversation with Mr. Watt when he said, 'We are no longer exchanging price information.' I cannot tie it down, but I think I did have a conversation with him.
>
> Question: What happened to the price levels after he said that to you?
>
> Answer: This would have been, I guess, in late 1968, 1969. Price levels on our particular market, at that time, were in the process of going down, and that is when you saw all the below-the-line stuff on the chart, here, and prices dropped dramatically in that period.

By Mr. BARTLIT:

Q. Did you so testify?

A. Yes, I did.

Q. Now, Mr. Simpson, you testified about some ideas [2425] that you had for the Gypsum Association. Do you recall that?

A. Yes.

Q. And I think you said that some of your ideas, such as the mobile home promotion program and the statistics program, were not accepted, and some ideas, like a movie on fire rated wallboard, were accepted; right?

A. I believe that is the way it went; yes, sir.

Q. Incidentally, with regard to the use of gypsum wallboard in mobile homes, the fact is, isn't it, that U.S. Gypsum pioneered the use of gypsum in the ceilings of mobile homes?

A. I believe USG was the first to manufacture a prefinished gypsum ceiling board; that is correct.

Q. And when you bought the Henslee Mobile Home Company, they were already using USG's ceiling board; is that correct?

A. No, they were not.

Q. When you bought Foremost, they were using USG ceiling board in their ceilings; weren't they?

A. Foremost was using primarily an insulated sheathing type of ceiling board. They were using some gypsum. I am not sure whether it came from USG, but, mostly, they were using a fiberboard product for their ceilings, until I bought it, at which time I changed to USG.

[2426] Q. They were buying United States Gypsum boards from USG prior to the time you bought it?

A. I don't know that.

Q. And are you aware, Mr. Simpson, that USG developed a special five-sixteenth-inch thickness wallboard specifically designed for the ceiling in mobile homes?

A. It was five-sixteenths or seven-sixteenths. I couldn't remember, in my testimony last week, which it was. Maybe it was five-sixteenths. I thought it was nominal half-inch, though.

Q. And the reason for that was the old three-eighths inch was too heavy, and a quarter inch wasn't rigid enough, so they came in with one in between to do the job; right?

A. I still don't remember which thickness it was. I should know that, but I don't remember, but weight was a factor. There is no question about that.

• • • • •

[2427] Q. And you don't know whether your memory was better back at the time of the Grand Jury; is that right?

A. I don't know how one's memory changes as one grows older, no, sir.

Q. I don't either.

The COURT. Mr. Bartlit. The jury will totally disregard that comment that bore with it an innuendo. It was improper.

• • • • •

REDIRECT EXAMINATION

[2463] • • •

Q. You have testified that at one point in time Mr. Watt said he wouldn't exchange these prices with you. Do [2464] you recall that?

A. Yes, sir.

Q. Did he tell you why he wouldn't exchange prices with you?

A. No. He just said he wouldn't exchange prices.

Q. Was the exchange of pricing information ever discussed at a Gypsum Association meeting?

A. With Mr. Watt?

Q. In the open meeting with counsel present.

A. Would you repeat your question? I don't understand.

Q. Certainly. Was the exchange of prices ever a subject of discussion at an Association meeting?

A. That first Association meeting I had a conversation with Mr. Watt about exchange of prices.

Q. That wasn't an open meeting; was it? Or was it?

A. Well, it was a private conversation between me and Mr. Watt, but there was a bunch of people around.

Q. I am talking about when you are all sitting down at the table and a lawyer is present and everybody is listening to everybody else.

A. Say it again now?

Q. Now, when you were in session at a Gypsum Association meeting with the secretary present and the lawyer present, was there ever an open discussion of an exchange of prices?

[2465] A. Of specific prices?

Q. No, sir. Just the concept generally.

A. O.K. The only thing I remember is the Association counsel talking about some court cases on exchange of price information and his report to the membership.

Q. Was this at or about the time that Mr. Watt said he wasn't going to exchange with you any more?

A. It was in the latter time that I was in the Association. I got out in the fall of '70. It would have been in the '69–'70 period.

• • • • •

RECROSS EXAMINATION

[2494] By Mr. BARTLIT:

Q. Finally, Mr. Simpson. Mr. Fricano wound up his redirect of you. He was asking you about that October 1964 first Gypsum Association meeting at the Broadmoor Inn?

A. Yes, sir.

Q. And he asked you whether if before the Grand Jury you were ever asked if Mr. Watts spoke to you at that meeting, and you said, "No." Do you recall that?

A. If I was asked that specific question?

Q. Yes.

A. To the best of my recollection, that's right, yes, sir.

Q. But it is a fact—isn't it—that you were asked [2495] who spoke to you before the Grand Jury?

A. Who when, sir?

Q. All right, let me back up. I can see why it might be confusing. We are talking about the Broadmoor again. We are talking about you said you had one meeting at the Broadmoor. And your recollection, as you sat here today, was that Mr. Watt had said, "You will be asked questions. Be honest."

Do you recall that?

A. Yes.

Q. And then I went through your Grand Jury testimony on that point on my examination. Do you recall that?

A. Well, I recall us talking about that, yes, sir.

Q. And Mr. Fricano came back and said: "Were you ever asked before the Grand Jury if Mr. Watt had such a discussion with you?" And you said, "No."

A. My recollection was that I was not asked that specific question.

Q. Right. But isn't it a fact that before the Grand Jury in December 1971 you were asked these questions and you gave these answers:

> Question: Can you recall precisely when and where these first overtures were made considering these requests for price information?
>
> Answer: The first time I had a [2496] question asked me on a specific I cannot recall specifically what it was. But the first time it happened was at the first Gypsum Association meeting I went to in October 1964.
>
> Question: Do you recall who made this?
>
> Answer: It could have been one or two or three people. It could have been, probably, Mr. Brown of National Gypsum Company. And then I had some telephone calls from him in addition to that at the meeting.
>
> Question: Is that Mr. John Brown?
>
> Answer: Yes.

You did so testify before the Grand Jury; didn't you?

The COURT. Mr. Bartlit, that is the point that I said is for the jury to determine, whether there is a contradiction in those two matters or not.

Mr. BARTLIT. That's not my question, Your Honor.

The COURT. What is your question?

Mr. BARTLIT. My question is whether he did so testify before the Grand Jury.

The COURT. All right. You may well be comparing apples and oranges here, so I am saving that for the jury.

• • • • •

[2497] Mr. BARTLIT. Yes, sir, that's exactly right.

The WITNESS. You read the transcript of the testimony; didn't you?

Mr. BARTLIT. Yes, sir.

The WITNESS. Then that's as I testified.

Mr. BARTLIT. No more questions.

• • • • •

[2499] Mr. BARTLIT. If the Court please, Your Honor, my motion is a motion to strike all of Mr. Simpson's testimony,

insofar as it relates to that Broadmoor, October, 1964, discussion that he talked about with Mr. Watt.

The basis of my motion is that it is a fatal variance from the bill of particulars.

The Court, on many occasions, told the Government that, if the Government expected to prove anything at this trial, it should all be set forth in the bill of particulars so Defendants would not be surprised.

In the bill of particulars, at the top of page 200, the bill says what, in my personal view, the Grand Jury transcript says; that is, "At the first Gypsum Association meeting he attended, in October, 1964, Simpson of Republic was approached by John Brown of National and invited to participate in the conspiracy." Nothing is said about Mr. Watt, in the bill of particulars, at the Broadmoor meeting in October. Nothing is said about Mr. Watt at the Broadmoor meeting with regard to price verification or the testimony [2500] that the witness testified today and the Grand Jury testimony.

I did not make the motion when the witness first said it because I was frankly, surprised, because it was not set forth in the bill, and, in my view, as counsel to Mr. Watt, it was a departure from the Grand Jury testimony.

I attempted, on my examination, to refresh the witness' recollection insofar as the Grand Jury transcript went. The Court left it up to the jury.

The COURT. Let me explain that.

Mr. BARTLIT. Yes, sir. I am not quarreling with it at all.

The COURT. You see, when he was asked about the conversations, allegedly, with Mr. Watt, it was a general discussion, between he and Mr. Watt, that he testified to. That you will be asked questions and answers—that isn't at all covered by the Grand Jury testimony, referring to a specific, which I take to mean the first time he was asked to compare a price.

Mr. BARTLIT. Your Honor——

The COURT. That's why I said we are comparing apples and oranges here.

Mr. BARTLIT. I take no exception whatsoever, on the record or any other place, to Your Honor's ruling that it is up to the jury to decide impeachment. That's not the point of my motion. I will be [2501] prepared to argue my version of it, but that's not the subject of my motion today. My motion is——

The COURT. Yes. I understand your motion, that this is contrary to the bill of particulars.

Mr. BARTLIT. Yes, sir, and I didn't know it until it came out on the witness stand. I had no reason to anticipate it, no way to prepare for it.

The purpose of the bill of particulars was not served in this case.

I have an individual Defendant. I don't know the extent to which this will or will not be an important item in the case. It appears to me that much emphasis was given to it by the prosecution and, therefore, I feel that it should be stricken as beyond the scope of the bill of particulars.

The COURT. Mr. Fricano, let's hear from you.

Mr. FRICANO. If Your Honor please, we produced, as this Court knows, the entire record. We produced the entire Grand Jury transcript. We gave them a voluminous bill of particulars. Within that bill of particulars, there are a number of references to Mr. Watt's activity.

We contend that, within the entire scope and framework of that bill of particulars and the record in this case, that Mr. Bartlit was adequately on notice of this [2502] type of information coming from a witness. If we were to be relegated to the whim and fancy of a witness coming out with a specific of this type and character and for it to be excluded from a case of this character, then, if Your Honor please, we couldn't try cases like this.

The COURT. That wasn't a whim and fancy, now. He was asked the question, and he answered it.

Mr. FRICANO. Oh, yes, Your Honor, and there was no objection at the time.

Mr. BARTLIT. I was caught totally flat-footed because——

Mr. FRICANO. Oh, Mr. Bartlit hasn't been totally caught flat-footed since he was born.

Mr. BARTLIT. You interrupted me.

The COURT. I haven't known Mr. Bartlit since he was born, so I can't answer that.

Mr. BARTLIT. Your Honor, it might even be that, if nothing had been said in the bill, there might be some merit. I wouldn't concede it, but I can see how a Court might conclude there was some merit in what Mr. Fricano says, but what the bill precisely says, the only conversation the man had on that day attributes

it to somebody else, and then, out of the blue, it is attributed to my man, and I know what I have to do, as counsel, try to refresh him, and he still sticks with that. It seems to me [2503] that, if the bill does mean anything with regard to an individual like Mr. Watt, that testimony has to be stricken.

The COURT. All right, now. What I am going to do is this. I am not going to rule on your motion at this time. I will give the Government time to show me where, in the bill of particulars or in the Grand Jury testimony, or whatever it is you claim, that Mr. Bartlit was put on notice that you were going to contend that Mr. Watt was invited to join the conspiracy at that first meeting he attended.

Mr. FRICANO. I think we did it in the offer of proof.

The COURT. Oh, no. I am not talking about the offer of proof.

Mr. FRICANO. No, wait a minute. I understand that, Your Honor, but Mr. Bartlit is contending that he was totally flat-footed or—excuse me—not flat-footed, but surprised, I think he said, with what was in the bill of particulars. Now, I think our offer of proof may have taken care of that.

The COURT. Well, I don't know that you can amend a bill of particulars.

Mr. FRICANO. I am talking about the surprise factor, Your Honor.

The COURT. I am not talking about the [2504] surprise factor. I am talking about the bill of particulars, and I want you to show me where, in the bill of particulars or in the Grand Jury transcript or some place——

Mr. FRICANO. Yes, Your Honor, page 305.

The COURT. No, not now. You give it to—I am going to give you—what do you want? Two days?

Mr. FRICANO. If Your Honor please, we are in the middle of some important witnesses.

The COURT. I don't want to get out records now, in the middle of a jury trial, and start looking. I want you to tell me, preferably by written memorandum, with a copy to Mr. Bartlit, where we can find such a reference.

[2505] Mr. FRICANO. All right, Your Honor.

The COURT. In other words, where he should have been placed on notice that such a claim was going to be made, not in the offer of proof, but something in pretrial.

The bill of particulars serves a purpose of avoiding surprise. I want to see how he should have known about this.

Mr. FRICANO. All right, Your Honor.

• • • • • •

[2519] • • •

Mr. FRICANO. Just that it is consistent [2520] with the prosecutions; that is, that man is going to testify that Mr. Nicely, when he visited him, that Defendant there, he said the majors were going to drive Mr. Huckleberry out of business. What better way is there of a predatory activity than maligning the man's boards. In other words, Your Honor, it is probative of the issues in this case, and that is the very reason when Mr. Bartlit stood and——

The COURT. All right. I will listen to it. And after I hear it, I may strike it unless it does do what Mr. Fricano has now represented that it will do.

Mr. BARTLIT. I can respond to that, Your Honor, but I think it would be better really for the Court to ——

The COURT. I think I would like to hear it and determine that question. Standing alone, that somebody comes and says that a fellow's wallboard falls to pieces is not very good, doesn't do anything. I agree with that. That is the old rule that you go to the dentist and he looks at you for the first time and he says, "Who put the filling in your mouth?" That may be nothing.

Mr. FRICANO. If that was all that was done, Judge——

The COURT. I am going to listen to the whole context, and we will see.

Mr. FRICANO. All right, sir.

[2521] The COURT. I don't mean to malign any dentists. I just used that as an example.

Mr. DELONE. Just one more thing on that. I understand Your Honor wants to hear it, but I don't mean to malign either dentists or judges. It is awful hard sometimes, no matter how conscientiously the Court tells the jury to forget something they heard, it is very hard to erase it from their minds. I don't think anyone knows how effective such instructions are.

The COURT. I don't know how anybody can predict what that kind of testimony will do to a jury either. It seems to me to be less than earthshaking.

Can we have the jury, please.

[The jury enters the courtroom.]

[2522] JOHN D. TINSLEY called as a witness and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Would you state your residence address, please, Mr. Tinsley?

A. 3857 Treeline Drive, Dallas, Texas.

Q. By whom are you employed, sir?

A. I am self-employed.

Q. In what type of business?

A. Wholesale lumber business.

Q. Would you please describe what that entails?

A. Selling lumber on a wholesale basis to the retail dealers at the lumberyards.

Q. Have you always been self-employed?

A. No.

Could you tell us your employment history back at least until 1959.

A. Covering from say 1952 to 1959 would be Davis Hollan Lumber Company of Dallas, Texas.

The Andrew Groves Lumber Company of Dallas, Texas to [2523] about 1963.

Then to the Norris Lumber Corporation to about 1965, at which time I bought the Norris Yard. And in 1966 went into the wholesale end of the business and got completely away from retail.

Q. Now, from 1952 to 1964 while you were employed at Davis Hollan and Groves Lumber Companies, did you purchase gypsum wallboard?

A. Yes.

Q. By the way, what jobs did you hold at Davis Hollan and at Groves?

A. Davis Hollan I was Assistant Manager for those years.

Q. And at Groves?

A. Basically the same. Mrs. Homer Groves owned the yard. I managed it for her.

Q. From whom did you buy gypsum wallboard during the period from 1952 through 1964?

A. We had——

Q. Excuse me, sir, I want to rephrase that to say from 1952 to the first part, early part of '62.

A. That would be the five dealers, if my memory is correct, in the area.

Q. Do you mean "dealers"?

A. Manufacturers. U.S. Gypsum Company, National [2524] Gypsum Company, Celotex, Bestwall, and Flintkote.

Q. How was this board delivered to you, sir?

A. By rail.

Q. Did you have a spur into your place of business at these times?

A. No, sir.

Q. How did you go about collecting the wallboard for transportation back to your place of business?

A. Well, we had to unload the cars on a siding and transport it up to our yards and put it into our stock.

Q. Was there any difference in the prices being quoted to you in this time period from the five producers of wallboard whom you have identified?

A. No. There was one basic price at all times at any dealer you dealt with.

Q. "Dealer," sir?

A. Excuse me, I keep saying "dealer." From any of the manufacturers you dealt with you had one basic price.

Q. What is a railroad spur, Mr. Tinsley?

A. Well, a railroad spur, railroad siding—whichever you refer to—it is an unloading team track. It is an area where cars are parked and different people can unload their cars.

Q. Where did you go to pick up your wallboard when you bought it?

[2525] A. Well, in distance?

Q. No. What kind of an area? Was there a designation for it?

A. Oh, yes, sure. The siding in our area was on the Santa Fe track, it is the Beckley team track. Now, in the case of Davis Hollan this was nine blocks away. In the case of Groves Lumber Company it was about the same distance in the opposite direction.

Q. Did you ever complain to any of the sellers of gypsum wallboard about this condition, about this condition whereby you had to go nine blocks away to pick up your wallboard?

A. Only for about eight or nine years, I would guess.

Q. What did you tell them during this eight or nine-year period, Mr. Tinsley?

Mr. DeLone. Objected to as irrelevant.

Mr. Spradlin. I would also add to that, Your Honor, another comment. I refrained to objecting to several leading questions. This is the Government witness and perhaps he could conduct a more routine direct examination.

The Court. Well, it does not help much by telling me that you refrained. If you call it to my attention I will see what we can do.

Mr. Spradlin. Yes, Your Honor.

The Court. Would you attempt not to [2526] lead on any matters of substance.

Mr. Fricano. Would you please read back my last question?

[Last question read.]

The Witness. It is not what I told, it is what I asked and requested.

The Court. Wait a minute.

Mr. DeLone. I objected on the ground of relevance, sir. If Your Honor has ruled on it, I didn't hear Your Honor.

The Court. I have not ruled on it.

Mr. DeLone. I didn't think you had. The witness tried to get a jump ahead of us. Just give us time.

The Court. Could we clarify that a little more closely so we don't wander up and down an eight-year period, and then we can rule easier.

Q. What period of time are you talking about, this eight or nine-year period?

A. Well, let's say from '53, '54 up until 1962.

Q. What did you state to the wallboard manufacturer's representatives that were selling to you in this connection?

Mr. DeLone. I renew my objection on the same ground.

[2527] Mr. McSweeney. I object on the ground that it is not a proper foundation. It is too broad and sweeping. He hasnt laid the necessary predicate for eliciting an oral conversation.

The Court. You may answer.

The WITNESS. I would have to answer that for all this period of time I asked for truck delivery into two specific yards in my case that were off rail. That is as I undrstand your question.

By Mr. FRICANO:

Q. Did they ever grant you truck delivery to these two yards?

Mr. SPRADLIN. Leading question, Your Honor.

The WITNESS. No, sir.

Mr. FRICANO. I think there was an objection.

The COURT. I didn't hear one.

Mr. SPRADLIN. It was too late, Your Honor. I withdraw it.

[2531] • • •

Q. Did you know, at that time, what position he held with Texas Gypsum?

A. I am sure he told me that he was president or had built the plant or owned the plant at that time. Yes.

Q. How much did you order from Texas Gypsum at this time?

A. I think I ordered, that day, two truckloads, one to be delivered immediately, if I remember right. These dates and invoices would not be available to me any more.

Q. Now, how long was it between the time that you ordered the two truckloads and the time that you received it?

A. I think the next—I think the truckload got there the next day or maybe two days, very short period of time.

Q. Did you ever get this kind of service from the manufacturers from whom you had been buying the prior——

Mr. SPRADLIN. Objection to the question, Your Honor. Here he is, leading again.

The COURT. I haven't heard the question.

Will you start over?

Mr. FRICANO. Yes, Your Honor.

By Mr. FRICANO.

Q. Did you ever get a one-day or a two-day service from the time you placed an order with any of the manufacturers [2532] whom you had been buying wallboard from before?

The COURT. Now, what's the objection?

Mr. SPRADLIN. My objection is that I consider that a leading question, Your Honor, and it suggests the answer inherently

in its content, and it's the type of question that the prosecution has been engaging in.

The COURT. There is nothing wrong with it, though. It asks for a yes or a no answer, and I seem to have heard those kinds of questions over three weeks, now.

Mr. SPRADLIN. I hope not from me, Your Honor.

The COURT. You have not, no.

Mr. DELONE. I object on the ground that it is irrelevant what kind of service, whether he got one-day delivery from the Defendants or not has nothing to do with the case.

The COURT. You may answer the question.

• • • • •

[2539] • • •

By Mr. FRICANO:

Q. Were you ever visited subsequent to this time when you had the conversation with these salesmen? Were you ever visited by an official of a major manufacturer?

A. Oh, yes, I was.

Q. Do you recall in point of time when this was?

A. Early spring of '62, in March.

Q. Did he come with anyone?

A. Yes.

Q. With whom?

A. Walter Forshay, who was a salesman for National Gypsum Company.

Q. Do you know who—who was that official of National Gypsum that came to your place of business?

A. Mr. Jay Nicely.

• • • • •

[2543] Q. Who were the they that Mr. Nicely was referring to?

A. Well now—I would have to say this is my impression, after getting this information that we are referring to.

Mr. DELONE. Your Honor——

Mr. SPRADLIN. Your Honor, this is speculation on the witness' part.

The COURT. You can say what he said to you, Mr. Tinsley, but you can't tell us what your interpretation of that is.

Mr. SPRADLIN. Your Honor, I hate to say this, but I am having a hard time watching the court and the witness. Mr. Fricano is——

The COURT. Watch the witness.

Go ahead, Mr. Fricano.

By Mr. FRICANO:

Q. Did Mr. Nicely, when he spoke to you about this policy of containment, dropping of prices in these markets where Texas Gypsum was going, did he speak in terms only of National Gypsum or did he say things or what did he say, if anything, concerning a group?

Mr. MCSWEENEY. Objection. He is leading and suggesting.

The COURT. He said what did he say.

[2544] Mr. MCSWEENEY. That wasn't all his question, Your Honor.

The COURT. That is the way I heard the question.

Mr. MCSWEENEY. May I have the question read? I thought I heard him ask something.

The COURT. What did he say about the group?

Mr. MCSWEENEY. That is correct.

The COURT. He can answer that question.

The WITNESS. The only reference there, as I say, this policy of containment——

The COURT. Did he say who had the policy of containment or not?

The WITNESS. Let me put it this way, in my belief and Mr. Nicely calling up on me, he came calling——

Mr. MCSWEENEY. I object now, Your Honor. That is not in response to your question.

The COURT. I want to know what he said to you. You see, we cannot take your belief or your interpretation. The jury has to interpret what he said.

The WITNESS. Oh, yes.

The COURT. And the only way they can do it is if you tell them what he said, whereas if you say I believe he meant so and so, that is not good evidence.

[2545] The WITNESS. I think this is something or other, something happened there, not that putting one little word in place, front or back, I don't think I can do this, but——

The COURT. We know that, but just generally what did he say to you?

The WITNESS. The policy of containment, this consisted of if Texas Gypsum Company entered into a market in Arizona, the price was dropped to a level where Texas could no longer make a profit. If that happened in Denver—I was familiar with these cases—it happened, of course, in El Paso. In other words, the profit possibiilty was eliminated.

By Mr. FRICANO:

Q. Did Mr. Nicely in this conversation with you mention his competitors? When I say his competitors, mention Bestwall, Celotex?

A. No, no.

Q. Did he tell you that National Gypsum was going to follow this policy of containment by itself?

A. No.

Q. Did Mr. Nicely ask you for anything?

A. Well, only to continue business on the basis as had always been done with Groves Lumber Company, yes.

• • • • •

CROSS EXAMINATION

[2569] • • •

By Mr. SPRADLIN:

Q. During our conversation in January of this year, did you not mention that you had been sent this document by the prosecution within the previous few days?

A. I said I had been sent documents pertaining to my statements given in El Paso——

Q. Was that——

A. In 1962. Now this is part of it.

Q. That was part of it?

A. This is part of it, yes.

Q. What else was in that package?

A. Well, it seems to have left out an answer or something regarding the very thing that got me so upset with everybody. I don't seem to find any answer regarding his statement to me regarding policy of containment.

Q. Those three words, policy of containment?

A. Policy of containment, yes, sir.

Q. In what I read you, can you find inaccuracies? Is the rest—in other words——

A. What we have here was definitely, and it is very true of our conversation. In other words, what I see here [2570] is fine. This was our conversation, yes, but we seem to be leaving out a little bit.

Q. The three words you have mentioned?

A. Yes.

Q. I suppose I have but one further question, and it is perhaps repetitious, but——

The COURT. If it is repetitious, let's not ask it.

By Mr. SPRADLIN:

Q. Mr. Nicely was trying to sell you National's wallboard, wasn't he?

A. Definitely, yes.

• • • • •

[2603] • • •

MALCOLM MEYER called as a witness and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath [2604] as follows:

DIRECT EXAMINATION

By Mr. THORSON:

Q. Mr. Meyer, where do you live?

A. Birchrunville, Pennsylvania.

Q. Are you appearing voluntarily in this proceeding?

A. I was subpoenaed.

Q. Were you, at one time, associated with a company called Bestwall Gypsum Company?

A. Yes, I was.

Q. Was this prior to its acquisition by Georgia-Pacific in 1965?

A. Yes.

Q. Did Bestwall Gypsum Company make and sell gypsum wallboard?

A. Yes.

Q. Where did it operate?

A. In various plants in the United States.

Q. Where did it endeavor to market its gypsum wallboard products?

A. In the majority of the United States.

Q. Where was Bestwall's headquarters?

A. It was located at Ardmore, Pennsylvania, and then for, I believe, the last three years prior to Bestwall's acquisition by Georgia-Pacific, it was located at Paoli, [2605] Pennsylvania.

Q. What position did you hold with Bestwall?

A. I was, at the start of Bestwall Gypsum, I was the executive vice president, and a director, and, in the last two years, I believe, two years of Bestwall, I was a director and not an officer.

Q. While with Bestwall, did you have any authority or responsibilities with respect to the pricing of gypsum wallboard products?

A. The Bestwall was operated by Mr. Lizars, who was the president; by myself, as executive vice president; and then by vice presidents—one in charge of sales, one in charge of production, one in finance, and one for law; and these four people would have reported through to both myself and Mr. Lizars.

• • • • •

[2607]

By Mr. THORSON:

Q. Did you, in your position, ever have, personally have, any conversations with any competitors of Bestwall with respect to the prices at which gypsum board products was sold to customers?

A. The one place where I would have had contact would [2608] have been on the checking of prices where I would have been called in relation to a given price to a given customer, but this was very rare.

Q. When you say would have been, does that mean this did happen?

A. Yes, yes.

Q. And you say you received calls.
Did you make any such calls?

A. I would say that probably, maybe in one or two as far as I would be concerned. I don't remember any more than that.

Q. Who did you receive these calls from?

A. The calls would be received from United States Gypsum Company, the National Gypsum Company.

Q. Any others?

A. I don't recall any other calls, as far as I am concerned myself.

Q. Did the people making these calls identify themselves?

A. The two people that I can recall would have been Mr. John Brown from National Gypsum Company and Mr. Watt from U.S. Gypsum Company.

Q. When did these calls occur, during what time period?

A. Oh, probably the late 50's——

Q. When——

[2609] A. Early 60's, but not later than that.

Q. When you made calls—I believe you said you recalled a couple you had made.

A. Um hum.

Q. To whom did you make these calls?

A. The same two gentlemen.

Q. During what time period?

A. It would have been late 50's or early 60's.

Q. When you received the calls, what was your response or acknowledgement to them?

A. The calls were to ask me a given price on a given product and as I would not know the prices directly, these calls would be handled by Mr. Berzilius or Mr. McCaskill.

Q. Or Mr. Meyer?

A. Or Mr. A. L. Meyer, sure.

Q. Did you refer the callers, Mr. John Brown or Mr. Andrew Watt, to one of those three gentlemen?

A. Yes.

Q. Did you refer them at various times to each of those three gentlemen?

A. I don't recall. I would—I don't recall.

Q. Do you know whether anyone within Bestwall, besides yourself, made similar calls to competitors?

A. I believe there would be some.

Q. Is it your recollection that there were?

[2610] A. Yes.

Q. Who made these calls on behalf of Bestwall?

A. I would say it would be the same three people at various times.

Q. And what information, if any, were these officials of Bestwall trying to learn from their calls to their competitors?

A. The exact price at a given time in relation to a given customer, and the purpose of this checking was because in Bestwall we had a competitive chart system whereby field organizations sent in any type of a different price that they would learn from a customer in the field and these had moved throughout our legal department, through both our internal legal department in our general counsel's office and they had to be verified in the verification of these prices. The first attempt, naturally, was to get an invoice. The second was to get any statement possible from a customer, and the third part would be if this was not possible, for one of those, would be an attempt that the—they would find out directly from a competitor if there was no other method they could find, nothing else in relation to an individual one.

Q. And when Bestwall made these calls, was it going to use the information obtained therefrom for making any kind of decision with respect to pricing?

[2611] A. It was verifying to the best of Bestwall's ability as to what the price was on a given shipment.

Q. Was this to help Bestwall make a decision as to a price to offer to a customer?

A. It would be one factor that would have to be taken into consideration.

Q. Did you not on a previous proceeding testify that it was to help Bestwall make a decision——

A. That is what I——

Q. As to a pricing matter?

A. It would be one factor that would be used in making a decision as to what Bestwall would do in relation to a competitive price.

Q. Did you on a previous occasion testify that you would base or Bestwall would base a decision as to price upon what was said in these discussions?

A. I think that would be proper, is the answer came back that the price was actually lower than the Bestwall price and Bestwall wished to meet the competitive price, yes, then they would be using the answer for that purpose.

Q. And do I understand——

A. Yes.

Q. Your answer is yes?

A. Yes, they would be using it for that purpose.

• • • • •

[2614] • • •

Q. Okay. Did you leave Bestwall at the time of the acquisition by G-P?

A. Yes, I did.

CROSS EXAMINATION

By Mr. MELLOTT:

• • • • •

[2660] Q. Mr. Meyer, did any competitor of Bestwall ever ask you what your thoughts were as to a possible price change for gypsum products?

A. No.

Q. Did any competitor of Bestwall ever ask you for your views as to any pricing practice for gypsum products?

A. No.

Q. Did you ever ask any of your competitors for such information?

A. No.

Q. Did any competitor of yours ever volunteer to you his views as to pricing of the gypsum products?

A. No.

Q. Did you ever volunteer such to any competitor.

A. No.

Q. Mr. Meyer, at any meeting of the Gypsum Association which you attended, did you ever hear any employee or officer of a gypsum company discuss a proposed change in the price of gypsum wallboard with a competitor or an employee of a [2661] competitor?

A. No, not to my knowledge.

Q. Now, Mr. Meyer, when you met with Mr. Huckleberry and asked him to join the Gypsum Association, what reason did you give him for joining the Gypsum Association?

A. As I stated before, I believe in an industry, that every member should be a member of its trade association if there is one.

• • • • •

Q. Mr. Meyer, did you ever advise Mr. Huckleberry, at any time, that the association was a useful vehicle for competitors to discuss pricing and marketing practices?

A. No.

Q. Was it a useful vehicle for that?

A. No.

Q. Was it any kind of vehicle for that?

A. For pricing?

Q. For discussing pricing?

A. No.

Q. Were prices ever discussed at Gypsum Association meetings?

A. No.

Q. Mr. Meyer, did you or anyone else at Bestwall, [2662] to your knowledge, ever make an agreement with a competitor to fix or maintain the prices of gypsum products?

A. No.

Q. —gypsum products?

A. No.

Q. Did you or anyone else at Bestwall, to your knowledge, ever make an agreement with a competitor that he would go along with a price change or go along with a change in terms of conditions of sale which you or Bestwall were planning to make or thinking of making?

A. No, not to my knowledge.

Q. Did you or Bestwall, to your knowledge, or anyone else at Bestwall, to your knowledge, ever make an agreement with a competitor to go along with a price change or to go along with a change in terms of conditions of sale which that competitor was going to make?

A. No, not to my knowledge.

• • • • •

[2690] • • •

Mr. DeLone. Maybe I could expedite my remarks if you want to take the recess now. I will do it whichever way you want, Your Honor.

The Court. Five other people want to say things, too, I see.

Mr. DeLone. I realize that, sir, but I am suggesting that, if we can take a good, hard look at this testimony before we get off, we may save days here in the courtroom.

For instance, one of the things Mr. Fricano has said he is going to attempt to prove by this witness is that he was visited by two representatives of American Gypsum Company, who said that they were emissaries of the Defendants and made threats, and I can't repeat all of what he said, but that's the gist of that matter.

Now, that's a conversation that Mr. Huckleberry is apparently going to testify about, that occurred in December of 1960. There is, so far as I know, no evidence in this record that would justify the conclusion that either of these representatives came from or were, indeed, emissaries of the Defendants. In fact, in the Grand Jury testimony of Mr. Quayle, one of the two, he expressly disclaimed that he was a representative of any of the Defendants and said that he was merely puffing when he spoke as if he were a represenative.

Now, that's American Gypsum—not one of the Defendants in this case. And, to admit that testimony of a conversation back in 1960 from someone who was not authorized by any of the Defendants, where there will be no proof connecting it up to the Defendants, nothing but the conversation itself, it seems to me would be highly prejudicial, and we are going to spend days, back and forth, about that, if that subject gets started.

I use this as illustrative, why I think we can save a great deal of time if we will look hard at the things that he has said he is going to try to prove through this [2692] witness.

The Court. I am not sure that I understand the nature of what you are proposing. If who looks hard?

Mr. DeLone. If Your Honor looks hard, if we take a moment to consider this massive offer, as we have had.

• • • • •

[2696] And, as soon as he sold out and lost a half a million, we will prove that Texas Gypsum immediately joined the Gypsum Association, where before it had not.

And that's it, Your Honor.

The Court. I am going to exclude that. I can't see how the discussion of a settlement of a lawsuit could be part of the conspiracy unless you can show that Mr. Price proposed to Mr. Temple that, if he could get Mr. Huckleberry out of that business, they would settle it up. If you can show that, I will permit it to come in. If you can't, I will not.

Mr. Fricano. All right, Your Honor.

• • • • •

[2722] CLAUDE HUCKLEBERRY

DIRECT EXAMINATION

[Court was reconvened at 1:30 p.m. o'clock. The jury was not present.]

Mr. DeLone. If the Court please, with reference to one aspect of the objection I made to the offer of proof, I do not think that I made my position entirely clear, and I want to do so now, so there will be no mistake about it.

The Court. Can you do the same thing I suggested for Mr. Mallin? You write it, and we will put it in the record.

Mr. DeLone. Well, I would ask Your Honor, it will only take me a minute or two to hear——

The Court. All right. We can't re-argue these things continually after a ruling. Go ahead.

Mr. DeLone. One aspect of the offer is that Mr. Fricano proposes to adduce from the witness conversations he had with a Mr. Quayle, the two representatives of American—they are, in fact, Mr. Quayle and Mr. Hardin. Mr. Quayle has denied, under oath, before the Grand Jury, that he ever appeared as an emissary.

The COURT. You told me that.

Mr. DELONE. But what I did tell Your Honor is that Mr. Quayle is dead. He is not available [2723] to these Defendants to refute the claim that Mr. Huckleberry says—he said he was there as an emissary, so we are now confronted with the problem of how do we meet such testimony if it gets before the jury?

Mr. Quayle is dead and is not now available to deny what he has denied before the Grand Jury. We believe this will be highly prejudicial if it goes in and that, indeed, the Government has no way to connect Mr. Quayle to the alleged conspiracy.

The COURT. This, I don't know.

Mr. DELONE. The Government has not indicated any way that it has, and, from our examination of the record, we find none, so that, in this case, in light of the fact the man is dead, it seems to us important to know at the outset whether there is any possibility that this conversation by Mr. Quayle or the statements of Mr. Quayle can be connected to the Defendants. He has denied it, himself, but he is not here to do it any more, and therefore, our position is that, as to this particular piece of hearsay testimony, there should be some connecting up before the jury is permitted to hear this purported or alleged statement.

The COURT. Number one, Mr. Fricano, how do you purport to make this a part of the exception to the hearsay rule?

Mr. FRICANO. I will lay a foundation right [2724] now, Your Honor. If Your Honor please, there is already independent evidence, aliunde, in the record connecting American Gypsum and Melvin Quayle to the conspiracy. I will recite it for the Court now.

He was invited and, in fact, joined the Gypsum Association, October, 1960. At that time, according to the testimony of Mr. Malcolm Meyer, who was on the stand this morning, the Gypsum Association favored rail flatcars. Defendants refused to depart from rail shipping, and the Gypsum Association members fought trucking, as testified to by Mr. Simpson.

Members of the Defendants here, of the Gypsum Association, were all cross checking with each other on competitive practices, including trucking, which is the focal point of Mr. Huckleberry's exposition of the facts here.

American Gypsum, according to the testimony of Mr. Bear, who was our second witness, I believe, testified that American Gypsum did not depart from standard industry practices and

delivery, which meant trucking, and prices, also—and prices, also, and it is also Mr. Bear's testimony that, when Quayle visited the United States Gypsum offices, in the summer of 1960, he was shown United States Gypsum prices which were on the basis of f.o.b. plant plus equalized freight rate. That was also Mr. Bear's testimony.

The COURT. Now, let me ask you [2725] something. Are you willing to stipulate that Mr. Quayle denied this under oath?

Mr. FRICANO. Oh, no, Your Honor. I am not. He said he went there. He went to—I am sorry, Your Honor.

The COURT. Mr. DeLone said—let me see the Grand Jury testimony, then, Mr. DeLone.

Mr. FRICANO. He said, under oath, that he, in fact, went to talk to Huckleberry, and he, in fact, made the statements that he made about the majors, but he was puffing. That was the testimony.

Mr. DELONE. And, going on, the Grand Jury: "Is it not a fact that it was done with the knowledge and blessing, the acquiescence of the major competitors?"

"No. I deny that. We have nothing to do with any trip down there or what I said to him or anything else. I deny that."

The COURT. Can we agree to read to this jury the testimony, that part of the testimony of Mr. Quayle, since he is now dead?

Mr. FRICANO. I would have no objection to it, Your Honor.

The COURT. All right.

Mr. FRICANO. In fact, I will mark his [2726] entire testimony, if necessary.

The COURT. At the point where you ask this witness about that, will you then read for the jury Mr. Quayle's—the questions that were asked Mr. Quayle and the answers he gave, so that—he is now dead—the jury will have that information?

Mr. FRICANO. All right. I will do that, Your Honor. And one further point, if I may, with respect to this. Mr. Hardin is not dead. He is very much alive.

The COURT. We are only talking about Mr. Quayle.

Mr. FRICANO. I know Mr. Quayle is dead. He can't refute any of this, but Mr. Hardin is alive and well. He was also an emissary of the majors.

The COURT. But they were there separately I am told.

Mr. FRICANO. Yes, Your Honor.

The COURT. I think, in fairness, we ought to tell the jury that, Mr. Quayle being dead, you are going to read to them—or if you think, Mr. DeLone, you want to read it, rather than have the Government do it——

Mr. DELONE. I will make the selection now and be prepared to read it, sir. Yes.

The COURT. You will read it. All right.

• • • • •

[2750] • • •

Q. Did Mr. Quayle ultimatey come and visit you the next day?

A. The next day; yes, sir.

Q. Would you relate the conversation that you had with Mr. Quayle?

A. Well, it was quite lengthy. The first——

Mr. KECK. Your Honor, may we also find out who was present?

By Mr. FRIANO:

Q. Was anyone present, at this time, other than you and Mr. Quayle?

A. No one except the tape recorder.

Q. I didn't catch that. I am sorry. No one——

[2751] A. No one except the tape recorder, I said.

Q. All right.

A. And I will explain why they were not.

Q. Why weren't they?

A. I offered to take him in my office, and my office wasn't very private. It had short walls, with space above, and other people working around, and he said he would rather go some place more private. I took him into the little laboratory we had set up, our quality laboratory, and I excused the technician, where we would be alone.

Q. Is that where you had the tape recorder set up?

A. Right.

Q. All right. Would you please tell us, to the best of your recollection, what he said to you and what you said to him in this room?

A. Well, I remember the first thing he said. Well, first, he spent almost 40 minutes talking in general about the industry.

He said he had been in the business 30 years or more. He carried me through all about the problems that they had had in the east, all the various companies he had worked with in the past, and he spent about 40 minutes, 35, 40 minutes, in general talk. And I told him that I had another party coming in and, when he arrived, I would have to break the meeting off, and he said, "Okay. I [2725] will get right down to what I came here for." He said, "All the big boys have been on the telephone trying to get me to come down here and see if there wasn't some way that we could straighten this thing out before anyone moved against Texas Gypsum."

• • • • •

[2782] Mr. FRICANO. Now we are left with the proposition of the cross-reading of the record.

The COURT. Yes.

Mr. FRICANO. I think probably, if I could make a suggestion in that regard, why can't we designate a neutral party to read both sections to the jury, get it in continuity. They have got——

The COURT. Does everybody agree to a neutral source?

Mr. BARTLIT. I will read it, sir.

The COURT. Get Mr. Burr and we will make him the neutral source and we will let him read what [2783] both of you designated.

Mr. DELONE. May we first learn what the Government's counter-designation is?

The COURT. Tell Mr. DeLone your counter-designation.

Mr. THORSON. Our counter-designations is page——

Mr. DELONE. Wait a minute.

Mr. THORSON. Page 2406, line 16 through page 2408, line 9.

I might add I was working from a carbon copy where the type may have slipped a little bit and sometimes it might be a half line off, so I had to interpolate a little bit.

The COURT. Mr. Burr, we have decided we need a neutral source to read the Grand Jury transcript as designated by both parties.

We will have Mr. Burr, with everybody's consent, read the designations.

Mr. FRICANO. No objection, Your Honor.

Mr. THORSON. Because of the possible mis-alignment, I would like to put a mark.

The COURT. Draw a line in red, so Mr. Burr knows where to start and where to stop.

Mr. THORSON. Yes, sir, I will.

[2784] The next designation is page 2410, line 4 through line 15.

Then page 2411, line 3, through page 2412, line 11.

Page 2414, line 1 through line 16.

Page 2416, line 15, through 2417, line 7.

Page 2417, line 23, through 2418, line 19.

Page 2420, line 1, through line 15.

Page 2425, lines 21 through 23.

The COURT. All right.

Now before we hear any objections to this, remember that I have been all through the trial very liberal both ways in allowing any party to ask for additional matters to be read and allowing them to be read, so I would not, you know, if there is something really substantial, fine, but I would like just technical maters to be raised right now.

Is there any objection to the matters designated?

Mr. MELLOTT. We need a little bit of time to look at them, but I have looked at the one page and it is obvious the question goes beyond any question of whether he was there as an emissary of the big boys. It is simply a question of whether he discussed trucking or something like that. I submit that has nothing to do——

The COURT. I will read the designated [2785] parts, then.

Mr. MELLOTT. I think you should do that, Your Honor.

The COURT. I am not going to read them to the jury. I will read them to myself to see.

Mr. DELONE. Does Your Honor have a copy of the Grand Jury transcript?

The COURT. No.

Mr. FRICANO. We will provide you with a copy.

Mr. DELONE. I have only one copy.

The COURT. It won't do me any good until I get their designations. Then I will read them.

• • • • •

[2787] The COURT. Now, do we have an agreement as to what is to be read?

Mr. DELONE. No, sir. I am sorry. I thought the Government had lent Your Honor the marked copy, which, I gather, they haven't. I can't say that there is unanimity, even among the Defendants, on this subject. It is apparent to me that there a number of pages which the Government has suggested which really do not bear on the point at issue, which is whether or not Mr. Quayle was an emissary, and I think that we might be able to shorten the [2788] whole matter and limit the argument if the Defendants simply designated one sentence said by the witness Quayle. It is all by itself, at the bottom of page 2443, and it reads, simply: "I was not any emissary, except for my own company;" and read that and nothing else.

The COURT. Well——

Mr. FRICANO. I object to that, Your Honor.

The COURT. Let me see what the Government—is that what the Defendants want to designate?

Mr. DELONE. That is what we would propose as the total reading, sir.

The COURT. Yes, but I have to see, now what the Government designation is.

Mr. FRICANO. The read line signifies our designation. The green line at the clips signifies their designations.

The COURT. The Defendant has changed theirs to the one line.

Mr. FRICANO. I am sorry.

Mr. DELONE. If more of the Government's is going to be read, we would want more read, also; but we are proposing, now, we said, simply the one sentence.

[2789] Mr. FRICANO. The first page, Your Honor is 2406, line 16, through 2408, line 9.

The COURT. Through——

Mr. FRICANO. 2408, line 9.

The COURT. All right. That is out. I am going to—I said what I am going to permit to be said about that tape.

Mr. FRICANO. No, no, Your Honor. It wasn't about the tape. It was whether or not the man was puffing or not.

The COURT. What you have—2406, you told me?

Mr. FRICANO. Yes, Your Honor.

The COURT. Through line 9, and that is only about the tape recording.

Mr. FRICANO. No, no, Your Honor, 2406. I am sorry. Please forgive me. 2406, line 16. I misspoke. I thought maybe they didn't put the red marks in the right place.

The COURT. And that is through line 9 on 2408?

Mr. FRICANO. Yes, Your Honor.

The COURT. All right. I am going to have read 2406, line 16, through 2409, line 7.

Mr. FRICANO. All right. The next designation, Your Honor, is 2410, line 4 through line 15.

[2790] The COURT. It can be read.

Mr. DELONE. On my copy, that ends with a question.

The COURT. On mine, it ends with, "Sure, I did."

Mr. DELONE. Oh, all right.

Mr. FRICANO. The next designation, Your Honor, is 2411, line 3, through——

The COURT. Do you have a record? You will have to read it.

Mr. BURR. How can I do it?

Mr. FRICANO. Do we have a copy of that? It is 2411, line 3, through 2412, line 11. I think it is blocked off with red.

The COURT. Well, from the line 24—on page 2411, line 20—starting with line 24, through line 11, is out.

Mr. FRICANO. Then, is 2411, lines 3 to 23, in?

The COURT. Yes.

Mr. FRICANO. Okay. The next designation is page 2412——

The COURT. Well, we have page 2412 here, now.

Mr. FRICANO. I am sorry. Excuse me.

[2791] The COURT. All right. We are going to let that in, 2412, line 12, through 2413, line 25.

Mr. DELONE. The next Government designation, 2414, lines 1 to 16—and I submit, sir, that that has nothing to do with the conversation, as such.

The COURT. That can go in.

Mr. FRICANO. The next designation, Your Honor——

The COURT. I have it here, 2414, 17 through the next page, line 20.

Let that go in.

Mr. DELONE. I am sorry, sir.

The COURT. I said that will go in.

Mr. DELONE. I am not sure what it is.

The COURT. Oh, it is 2414, line 17 through line 20.

Mr. DELONE. Thank you, sir.

[2792] The COURT. I am going to leave that out.

Mr. DELONE. Yes, sir, from line 2416, line 16, to 2417, line 7.

The COURT. Yes, that's out.

Mr. FRICANO. I am sorry, Your Honor. I don't argue——

The COURT. Since I have already said the only thing I am going to permit to be said about that tape, and that's what this is about.

Mr. FRICANO. I know, but it has some probative value as to what he did afterwards. He went back to his competitors and told them.

That's the whole point, Judge. Why would he go back to his competitors and tell them about a tape recording if he wasn't an emissary? He was acting as their agent, Your Honor.

Mr. DELONE. The first part says he didn't.

The COURT. You see, the trouble is it doesn't say it.

Mr. FRICANO. It does, "Did you go back?"

Mr. DELONE. That's right.

The COURT. And he said, "I don't recall calling anybody up."

[2793] Mr. FRICANO. "Did you every talk with any of your competitors about the fact that Huckleberry had made a tape recording of your conversation?"

Answer: "I probably did."

The COURT. That isn't the same as what you said, he went back and called up all his competitors.

Mr. FRICANO. Well, it says—if Your Honor please, it is a fine distinction, I suppose, but——

The COURT. Maybe it is, but I am going to make it.

Mr. FRICANO. Oh.

The COURT. Now, when we get to 2417, line 23 through 2419, line 19, I am going to let that in.

Mr. MCSWEENEY. If the Court please, doesn't that also refer to the tape?

The COURT. It does, but it goes a good bit further. It indicates that practically everybody in the industry knew he had been taped, which is——

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Mr. DeLone. But the fact that he had been taped is not in issue, sir. It is what he said when he was there, what he represented.

The Court. Well, this has some kind of an inference as to what he was doing there when everybody knew he had been taped. I am going to let that in.

Mr. DeLone. The Court is at 2420, now?

[2794] The Court. Yes.

Mr. DeLone. I would ask you, if you are going to read the material the Government has designated down to line 15, then the reading should continue to 21, in my contention.

I didn't know they were going to designate that, because it finishes it up.

The Court. I agree with that. That's okay.

Mr. Mellott. If the Court please, if I could just interrupt for a minute, if its is the Court's intention to have this read only if all counsel agree to it, I would state at this point that with the proposed rulings Your Honor has indicated, counsel for Georgia-Pacific will object to any portion of this being read into the record.

The Court. Well, of course, the Defendants don't have to read anything into the record, and if they don't read anything into the record, then there won't be any reason to read the rest of it in, but if they do read it in, then I am going to let the rest of it come in.

Mr. Mellott. Based on the proposed ruling which Your Honor has indicated, while I would have preferred to have read in that last two lines that Mr. DeLone indicated originally, I do believe that it is improper for [2795] the Government to read in all of the additional items that Your Honor has indicated you will permit simply because of the fact that the Defendants want to read in those two simple lines, and I, therefore,——

The Court. Well, it would be grossly unfair to read just those two simple lines, and I am not going to give that any consideration whatsoever.

Mr. Mellott. All right, Your Honor.

The Court. I think that would be grossly misrepresenting the testimony of this witness before this Grand Jury.

Mr. Mellott. I respectfully disagree with Your Honor.

The Court. You have a perfect right to disagree, but there is no reason to put that on the record.

Mr. Mellott. I will, therefore, object to any portion of it being read.

The Court. You may put your objection on the record. I would just as soon—I would prefer that you keep your disagreements to yourself.

Mr. Mellott. Thank you, Your Honor.

The Court. And, of course, those two lines that have been designated may be read, "How long were you there?" On page 2425 and 2443, "I was not an emissary except for my own company," may be read.

[2796] Mr. DeLone, do you want to read anything to this jury from this transcript knowing that——

Mr. DeLone. I beg your pardon, sir, but I think just so I can be sure of what we are talking about, did Your Honor mention page 2429?

The Court. 2429, no, because I didn't have anything there.

Mr. DeLone. That should have been marked. I guess the Government—that was included in my original designation.

The Court. Oh, yes, there wasn't a paper clip there.

Mr. DeLone. 2429, which is very definitely on the point that we have been talking about.

The Court. That can be read.

Mr. DeLone. That's from line 5 to line 13.

The Court. All right. That can be read.

Mr. DeLone. And just so I am sure I know what I am talking about, sir, in view of Your Honor's ruling, the final one, then, is at 2443.

The Court. Yes.

Mr. DeLone. I ask that it be read.

The Court. All right. You want it [2797] read?

Mr. DeLone. But I do not purport to speak for anyone but Defendant National Gypsum Company.

The Court. Of course, not. If you want it read, I am going to let you read it, but in accordance with the rules of evidence as I understand it, if you may read it, then the opposite party or any of your co-counsel can designate sections which they wish to be read, with the idea of getting as much of it before the jury as anybody wishes to get there.

Mr. DeLone. So I am clear, in light of Your Honor's ruling, I am saying I still ask that all the passages you have indicated can be read be read. I realize others may want to designate something more.

The Court. If anybody wants to designate additional things here, we will not get done with this until about 4:30.

Bring in the jury, Mr. Keene.

Mr. McSweeney. I wanted to register my objection to it, if it is not going to be read in its entirely, in behalf of my client.

The Court. If what isn't going to be read in its entirety?

Mr. McSweeney. If the portions which Your Honor designated, and principally page 2416, line 16—no, [2798] excuse me. 2417, line 23, to 2418, line 19, where he talks about tapes.

The Court. Yes. The jury already knows there are tapes, and the relevant part of this is not the contents of the tapes, but the fact that apparently the knowledge was passed all around, indicating that this man was perhaps an emissary, if that's the inference the jury wishes to draw from it.

That's why I am having it read. You have noted your objection.

Mr. McSweeney. I understand Your Honor, but I will say I do object, Your Honor.

The Court. Fine. Anybody who wants to object, may do so.

Mr. Bartlit. Your Honor, I am going to object on behalf of Mr. Watt to any Grand Jury testimony being read by anybody.

[2799] Mr. Fricano. If Your Honor please, I think Your Honor is taking a head count. You better find out who is now backing off.

The Court. Everybody that wants to say something has said it.

Mr. Fricano. Then I understand that—Do I understand that counsel for Mr. Brown and Mr. Nicely are not objecting?

The Court. They haven't said one word.

Mr. Spradlin. I have not entered the objection. I appreciate the solicitation.

The Court. He has said nothing one way or the other.

Mr. Fricano. Counsel for the United States Gypsum?

The Court. He hasn't made an objection. And Mr. Keck has made no objection at all. Objections were made, I believe, by Mr. McSweeney——

Mr. McSweeney. Yes, Your Honor.

The Court. By Mr. Bartlit——

Mr. Bartlit. Yes, sir.

Mr. Mellott. And by Mr. Mellott.

The Court. And by Mr. Mellott.

Mr. Fricano. May we have the grounds? [2800] May we have the grounds for their objection on the record, please?

Mr. Bartlit. Yes, sir, Judge.

The Court. No.

Mr. Bartlit. Grand Jury transcription not substantive evidence. That's my objection.

The Court. Well, I got into all this in an effort to be fair, since the witness was dead. That's how we got into all this.

Mr. Mellott. It is hearsay. My client——

Mr. Bartlit. Your Honor, for the record. I know that I appreciate the Court's consideration, no reflection whatsoever on anybody, but my own judgment—And I appreciate the Court's lengthy consideration of this. I just object to it on the ground of hearsay.

The Court. Mr. DeLone, you are the proponent of it. What is your viewpoint?

Mr. DeLone. I think it is hearsay. I will agree with that. But in light of the amount of—I mean, in light of this situation I would rather have the jury know that were Mr. Quayle not dead he would deny the fact that he was there representing the defendants. So, for that reason, I propose that I cannot say that it is not hearsay. I think it is.

The Court. No question it is hearsay.

[2801] Mr. Keck, I'd like to hear from you.

Mr. Keck. Do I have to give a reason for no objection, Your Honor?

The Court. No. I just wondered—having a high respect for your legal ability, I would like to hear your view on the subject.

Mr. Keck. Well, I regret very much that Mr. Quayle isn't here. And I think that perhaps if he had been here he would have testified within the bounds that Your Honor has marked out, so I therefore did not object. As to hearsay or not.

Mr. Spradlin. Your Honor, I, too, on behalf of Defendant's Brown and Nicely, think that this type of evidence has to go in but it represents exactly what I was talking about yester-

day in my objection to this ancient evidence and our difficulty in defending individuals against these laws.

The COURT. Well, there isn't any question that it is hearsay. No question about it. There is no question now that none of you men are going to have the opportunity to cross-examine any further on this matter.

But, I feel that out of essential fairness I should do this, because we have got testimony as to what Mr. Quayle said. And, what he said at the Grand Jury was not exactly the same, not the same as that. And it seems to me [2802] to be unfair to the defendants here to have that testimony go in without his objection. Or without his—without what he said.

So, even though it is hearsay, I am going to allow it to be done because I think that fairness requires it. And I think that what is not fair is not due process, and I want to assure within my abilities that everybody does get due process.

Now bring in the jury.

Mr. KECK. Your Honor, while the jury is coming in, might I inform the Government that if the Government will check the microfilm numbering 311289 to 311294 they will see that they themselves gave us this, having received it themselves by subpoena from third parties.

Mr. FRICANO. I missed that.

The COURT. You have gotten the numbers of those?

Mr. FRICANO. Yes, Your Honor, I have the numbers right here.

The COURT. All right.

• • • • •

[2805] • • •

The COURT. Mr. Quayle was called as a witness to testify before the Grand Jury in this matter. You remember what I told you about the way a Grand Jury functions.

And, in listening to the testimony, bear in mind that none of the defendants were represented before that Grand Jury. None of them had any opportunity to cross-examine Mr. Quayle. The Government representatives were there and they were asking whatever questions were asked and Mr. Quayle was answering them.

And I am doing this for the sole reason that I have stated. And that is, I think it would be unfair to have a version of what Mr. Quayle said without giving you an opportunity to hear this. But as you weigh it, weigh it knowing the way this happened—that he was there, he was under questioning by skilled cross-examiners, skilled examiners, and there was nobody on the other side present.

All right. Mr. Burr is going to read this to you.

Mr. BURR. Question——

Mr. MALLIN. Pardon me. May we have the page?

Mr. BURR. Do you want the designation?

[2806] Mr. MALLIN. Yes.

Mr. BURR. Beginning at pages 2406, line 16, reading through to page 2409, line 7.

> Question. Did you have anything important to tell him about selling practices at that time?
>
> Answer. No. As I recall, the only thing I told him was that I thought he was foolish not to join the association. I think I outlined some 16 reasons why he should belong to it.
>
> Question. You outlined 16 reasons for his belonging to the Gypsum Association. Did any of them relate to the maintenance of better industry relations to the competitors?
>
> Answer. Well, only insofar as he could attend the Gypsum Association meetings, yes.
>
> Question. So he could see his competitors, the officials of those companies, eyeball to eyeball, and have better mutual respect and admiration for each other?
>
> Answer. Yes.

[2807] Question. Better able to size each other up as competitors in the marketplace?

Answer. Well, that is normally the basis of a trade association, isn't it, Mr. Thorson? There are lots of them in the business.

Question. Well, you are the witness, Mr. Quayle. You were a member of the Association. You went to the meetings.

Answer. Well, you know what trade associations are. They are for the betterment of an industry.

Question. Now, was Mr. Huckleberry amenable to your suggestion that he join the Gypsum Association?

Answer. He said he would consider it.

Question. And did he consider it?

Answer. Not as long as I was in the business.

Question. Did he join the Association?

Answer. I do not know. I think he probably did.

Question. Was Mr. Huckleberry the only person you talked to with respect to Huckleberry's belonging to the Gypsum Association?

[2808] Answer. Yes.

Question. Did you ever talk with any of your competitors about Huckleberry becoming a member of that Association?

Answer. Oh, we may have.

Question. You may have. Well, sure you did. Did you not, when you went to the Association meetings, didn't they tell you, "Look, you talk to Huckleberry. Get him to join."

Answer. No.

Question. Did they ever tell you not to get him to join?

Answer. No.

Question. Did you have any conversations with any competitor regarding Huckleberry's membership in the Association?

Answer. Not that I recall.

Question. Did Mr. Bear ever suggest to you, "We ought to get Huckleberry in the Association?

Answer. No. My recollection is at the time I saw Henry Bear, Huckleberry had not even entered our picture. He had not even been up to our plant, office.

Question. Well, did you ever speak with any of the competitors at Gypsum Association [2809] meetings about Texas Gypsum's possible membership in the Association?

Answer. No, not that I recall.

Question. Was Texas's position in the industry ever discussed at a Gypsum Association meeting?

Answer. Not while I was there.

Mr. BURR. I am now reading from page 2411 from line 3 through line 23.

Question. You were meeting Texas. Then somebody else would have to meet the combination of American and Texas, would they not?

Answer. Well, we were too small. They would meet Texas before they would bother with us.

Question. And if they met Texas, if the other companies met Texas's selling practices, that would have an adverse effect on American, would it not?

Answer. That is correct.

Question. So it would have a snow-balling effect, rather than just the effect of Texas, itself?

Answer. That is right.

Question. And you knew that this would adversely effect the other competitors in [2810] the marketplace, did you not?

Answer. Oh, sure.

Question. And they told you that, had they not?

Answer. No, nobody told me. We knew it.

Question. Didn't you tell Mr. Huckleberry that they told you that?

Answer. No.

I am now reading from page 2412, line 12 through page 2413, line 25.

Question. So when you said the big boys, they want you to stop this job site trucking, that was just taken out of context from the entire tape, is that your testimony?

Answer. I call it puff talk.

Question. Puff talk?

Answer. That is right.

Question. Do you often engage in puff talk, Mr. Quayle?

Answer. Many times.

Question. Do you have a good solid business reason for engaging in this particular puff talk?

Answer. Yes. The policy he was [2811] following was going to hurt us.

Question. This was dollars and cents and profits involved, was it not?

Answer. That is correct.

Question. And it was an element of competition in that marketplace that you wanted to avoid, did you not?

Answer. That is right.

Question. And you told Mr. Huckleberry that the big boys wanted to avoid it too?

Answer. Yes, that was puff talk. A little pressure.

Question. And you were trying to put pressure on him, were you not?

Answer. Maybe.

Question. You wanted him to stop that site trucking?

Answer. I wanted him to stop trucking at the time, whether it was job site or dealer.

Question. Well, wherever he was trucking it to. And the big boys had told you that they are opposed to his trucking practices, too, had they not?

Answer. They had not told me anything. We knew they were, but——

[2812] Question. How did you know they were?

Answer. Because they were in the market meeting the competition in various ways.

Question. You just concluded this, or inferred this?

Answer. No. They had already set up warehouses to truck to the job down in El Paso. This, I knew.

I am now reading from page 2414, line 17 through 20.

Question. Now, had you had any conversation with any of the major competitors with respect to Huckleberry's trucking practice prior to your going to El Paso to tell him this?

Answer. No, I did not.

I am now reading from page 2417——

Mr. DeLone. I believe you have—I believe, sir, that Your Honor said to go from 2414, line 17, to 2415, line 20.

The Court. Didn't I draw a blue line further down there?

Mr. DeLone. I am sorry to interrupt but there was a little confusion in the marking that was originally designated.

[2813] You read just this.

Mr. Burr. No, I did not. I read to there.

Mr. DeLone. I think the Judge said the rest of it was to be read, too.

Mr. Fricano. That is what we took down. I can't swear to this. I won't make a representation one way or the other.

Mr. DeLone. Let me took at it, then. Apparently it wasn't called to Your Honor's attention in the copy the Government marked.

The Court. I might not have seen it.

Mr. DeLone. Maybe I will withdraw it, sir. I have not had a chance to see it yet.

I would ask Your Honor to rule on that.

The Court. May I see it?

Mr. DeLone. From line 23 at the bottom of 2414 to line 20 at the bottom of 2415.

The Court. From what?

Mr. DeLone. Line 20.

The Court. Line 20 on 2414?

Mr. DeLone. 25, sir. Mr. Burr has read down through 23, I guess.

The Court. Would you read line 25?

Mr. Burr. Starting at 21?

[2814] Mr. Fricano. Your Honor, I think if you are going to do it, you should start at line 21 and pick it up.

The Court. Start there and read through line 20 on 2415.

Mr. DeLone. Thank you, sir.

Mr. Burr. I will read line 17 through 20 on page 2414.

Question. Now, had you had any conversation with any of the major competitors with respect to Huckleberry's trucking practice prior to your going to El Paso to tell him this?

Answer. No, I did not.

Question. You deny under oath that you had any conversation with any other competitor with respect to that practice?

Answer. With respect to that particular practice, yes, sir.

Question. Did Mr. Hardin have any conversation with any of its competitors with respect to Mr. Huckleberry's trucking policy prior to your going to El Paso to try to dissuade him from doing so?

Answer. I do not know.

Question. You do not know?

Answer. No, I do not know.

Question. Did you have any instructions from Mr. Hardin with respect to your approach to Mr. Huckleberry?

Answer. No.

Question. Did Mr. Hardin know you were going down to talk to him?

Answer. Yes, he asked me to go.

Question. And to tick off the 16 reasons for joining the Gypsum Association?

Answer. No, he asked me to go to see if I could help him. He was having paper trouble. He was having set trouble. He was having split edges. He was having peelers. He was having all the troubles he could have in the gypsum business.

I am going to read from page 2417, line 23 to page 2418, line 19.

Question. Mr. Quayle, let me read to you from your earlier deposition testimony. The question was asked, "Did you ever inform U. S. Gypsum that your conversation had been taped?"

Answer. Not directly, no.

Question. Well, how did you do it?

Answer. I recall calling several people, telling them that I had been taped.

Question. I am not talking about [2816] several people. I am talking about U. S. Gypsum.

Answer. I never had any direct conversations with them about that.

Question. Well, indirectly, how did you inform them?

Answer. I did not inform them indirectly.

Question. You did not inform them? Well, you say you recall talking to several people. What people did you talk to?

Answer. I recall talking to Don Miller and saying it had been taped. Bud Storey, John Brown and Al Meyer. They all knew it before I told them.

[2817] Question. well, how did you do it?

Answer. I recall calling several people, telling them that I had been taped.

Question. I am not talking about several people. I am talking about United States Gypsum.

Answer. I never had any direct conversations with them about that.

Question. Well, indirectly, how did you inform them?

Answer. I did not inform them indirectly.

Question. You did not inform them. Well, did you say you recall talking to several people? What people did you talk to?

Answer. I recall talking to Don Miller and saying it had been taped. Bud Storey, John Brown, and Al Meyer. They all knew it before I told them.

I am now reading from page 2420, from line 1 to line 21.

Question. I will restate that. In your conversation with Mr. Huckleberry that he recorded, did you not refer to your major competitors as the big boys who wanted Texas not to offer job [2818] site trucking?

Answer. I probably did.

Question. And that was true, was it not, what you told Mr. Huckleberry?

Answer. It was probably true.

Question. Probably, it is your best recollection, that what you told Mr. Huckleberry was true?

Answer. Yes.

Question. Because you had no reason to lie to Mr. Huckleberry at that time; did you?

Answer. Absolutely not.

Question. So, when you told him that the big boys wanted him not to job site truck, you meant it because it was true?

Answer. Well, the use of the term, I told you before, was simply a little pressure, puff talk to try to get him out of it. I did not know what their attitude was until they set up the warehouses.

I am now reading from page 2425, lines 21 through 23.

Question. Well, how long were you at Mr. Huckleberry's plant, talking to him?

[2819] Answer. Probably two hours.

I am now reading from page 2429, lines 5 through 13.

Question. And it was done with the knowledge and blessings of your major competitors; was it not?

Answer. No, I did not say that.

Question. Is it not a fact that it was done with the knowledge and blessing, the acquiesence of the major competitors?

Answer. No, I deny that. We have nothing to do with any trip down there or what I said to him or anything else.

On page 2443, lines 24 and 25:

The Witness. I was not any emissary except for my own company.

The COURT. That concludes the reading, does it not?

Mr. BURR. Yes, it does.

The COURT. All right. Now, Mr. Burr read that to you because we thought that, as I understand, it would be better to have it read by a neutral party rather than counsel for either side.

Mr. Huckleberry, do you want to take the stand again, please?

• • • • •

[3198] ROBERT GIMLIN.

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Would you please restate your name and residence [3199] address?

A. Robert C. Gimlin, 25 Hawthorn Avenue, Toronto, Ontario.

Q. By whom are you employed?

A. Abitibi Paper Company, Limited.

Q. In what capacity?

A. As Group Vice President, Newsprint.

Q. What is the business of your company?

A. Paper pulp and lumber.

Q. Do you sell paper products to any of the gypsum companies?

A. No, sir.

Q. Were you ever employed by United States Gypsum?

A. Yes, sir.

Q. During what period of time?

A. 1946 to 1966.

• • • • •

[3201] By Mr. FRICANO:

Q. Were you assistant to the president from July 8, 1960 to February 11, 1962?

A. I can't recall those dates, but that would be the approximate time, sir.

Q. Were you general merchandising manager and then vice president of merchandising with the same responsibilities from approximately February, 1962 to January 27, 1966?

A. I believe so, yes, sir.

Q. Did you resign on January 28, 1966?

A. That is when I left the company. I resigned previous to that.

Q. The Merchandising Department of which you were in charge, was that the liaison between sales and the Operating Department?

A. That was one of its functions.

Q. Was it also responsible for pricing and the formulation of all policies and procedures with respect to prices and policies and also made recommendations to Mr. Watt, who at that time was vice president of marketing?

A. It handled, among other things, the administration of pricing and making recommendations.

Q. Who was your superior at this time, when you were Director of Merchandising and Vice President of Merchandising?

A. Mr. Watt.

[3202] Q. Did you answer directly to him?

A. Yes, sir.

• • • • •

[3222] Q. While you were Director of Merchandising and Vice-President of Merchandising—which I believe was from '62 until the time you resigned—did you have an understanding with the other major producers of gypsum wallboard whereby you would exchange with one another competitive pricing information and other matters relating to competition?

Mr. HIERING. Object, Your Honor, on the further ground it calls for the opinion and conclusion of the witness without any foundation.

The COURT. Overruled.

The WITNESS. Would you please ask the question again, sir?

[3223] The COURT. Would the court reporter read it back.

[Last question read back.]

The WITNESS. We exchanged competitive information.

By Mr. FRICANO:

Q. Is the answer to my question "yes" with that explanation?

A. Yes, sir.

Q. Now, this understanding wasn't in any written document; was it? Or, was it?

A. No, sir, I don't remember ever seeing one.

Q. Now, do you know what the policy was, the written printed policy was, of United States Gypsum with respect to the exchange of pricing information between competitors?

A. We had a document that outlined that.

Q. I ask you to pick up Government Exhibit 22 and ask if you can identify that.

The COURT. Hasn't that been identified and placed in evidence?

Mr. FRICANO. It is in evidence and it has been identified, but I want the witness to be able to identify it as a policy to which he just referred.

The WITNESS. No, sir, I have never seen this before.

[3224] By Mr. FRICANO:

Q. You have not seen Exhibit 22 before?

A. When I worked for U.S. Gypsum, no, sir.

Q. That document is in evidence and was produced from the files of United States Gypsum, and it is entitled "Legal Aspects of Selling.". Do you see that?

A. Yes, sir.

Q. I direct your attention to page Roman 12-11. Do you have that?

A. Yes, sir.

Q. On that page the last paragraph reads:

> "It is a defense to a violation of the Act—" the Robinson-Patman Act, "—that the seller makes a lower price and furnishes services or facilities in good faith to meet an equally low price of a competitor or services or facilities furnished by a competitor. This permits a seller to meet in whole or in part, but not to beat an actual competitor's equally low price without having to extend that price to all other competing customers. Thus, it is permissible for the company to meet competitive situations as to price, policy, service, terms and conditions of sale, either wholly or in part. The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade. Pertinent facts should be recorded on appropriate forms for future reference."

[3225] Was this ever, this document or the facts as stated here—that the information to meet competitive situations could only be obtained from the trade—ever the subject of discussion between you and any other officials at United States Gypsum?

Mr. HIERING. I object to the form of that question, Your Honor. The witness said he has not seen the document and doesn't know anything about it.

The COURT. That isn't what he asked him. He asked whether the consent of the document was discussed.

Overruled.

Mr. HIERING. Well, that subject——

The COURT. Overruled.

The WITNESS. Whether this document was ever discussed?

The COURT. No. Whether that subject was ever discussed.

By Mr. FRICANO:

Q. That subject, sir. The facts justify such a meeting of competitive situations necessarily can only be obtained in the field from the trade.

A. I don't ever remember this being discussed. And we had other documents that said we could contact.

Q. I ask you to pick up U.S.G. 63. Do you have that [3226] there, sir?

A. Yes, sir.

Q. And I want you to look at that briefly if you will, please, and see if you recognize it.

Mr. FRICANO. This document is in evidence, Your Honor.

The WITNESS. Yes, sir.

By Mr. FRICANO:

Q. This is a document signed by Graham Morgan, President of the company, dated February 13, 1962; is it not?

A. Yes, sir.

Q. And the signature appearing here is H. C. Bear. But, did you sign one just like this?

A. I believe I did, sir.

Q. And attached to it is a document entitled——

A. I know I signed one, and I assume it was just like this.

* * * * *

[3229] Q. Now, I would like to focus on one aspect of this, Mr. Gimlin, and that is job price protection. Can you tell us what you understand and how you applied job price protection while you were Director of Merchandising and Vice-President of Merchandising of United States Gypsum?

A. Job price protection would be where we had guaranteed to a buyer a certain volume of material at a stipulated price.

[3230] Q. What was the policy of United States Gypsum with respect to price protection?

A. We granted, to the best of my recollection, price protection for Government jobs and didn't grant price protection, to the best of my recollection, for other kinds of jobs.

Q. Was this the policy of the company?

A. Yes, I believe it was.

Q. Was it the published policy?

A. I don't remember whether it was published or not, sir.

Q. Do you know what the policy of your competitors was with respect to price protection?

A. I have no direct recollection as to what it was; no, sir.

Q. Did you, from time, engage in conversations with your competitors, the major producers of gypsum wallboard, in an attempt to ascertain whether or not, with respect to a particular price increase that was coming, as to whether they were going to grant job price protection?

A. We would—my best recollection is we would verify job protection, just like any competitive situation that was reported to us.

Q. All right, sir. Now, I am directing myself, now, to a specific time period. Did you, from time to time, [3231] between the time of announcement on a price increase and the effective date of that price increase, have conversations with your competitors concerning whether or not they were going to grant price protection in connection with the price—effective date of the price increase that was coming?

A. I can only give you a general recollection that we would have verified, during that period of time, if we had a competitive situation that was drawn to our attention.

* * * * *

[3234] Q. With respect to those, would you describe them, please, what kinds of conversations they were, what you were trying to find out, and what they were trying to find out, and what you actually found out?

A. It would be verification of a competitive situation like a price deviation, where we had a report that somebody had offered to protect the price beyond the price increase date, and we would verify whether we had a competitive situation.

Q. You will have to spin that out a little more, because I don't know that we all understand that, Mr. Gimlin.

A. Well, I am not sure.

Q. All right. I will try a new question, then. Bear with me, if you would.

A. Yes, sir.

Mr. FRICANO. Can I use a hypothetical with the witness, Your Honor?

The COURT. Let's hear it.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Assuming a price increase on fire rated board, to go into effect September 1, 1965.

Mr. FRICANO. If the Court please, I think I'd better use the easel.

[3235] By Mr. FRICANO:

Q. GX 5000—hopefully, we won't get that far. All right. This will signify the announcement date, for purposes of our hypothetical, July 1, 1965, the announcement date of a price increase on fire rated board.

Let's assume that Georgia-Pacific, G-P, was the first company to make the announcement to be effective September 1, 1965. All right?

A. [Nods head.]

• • • • •

Q. • • • Now, did you, from time to time, get reports from the field, in this 60-day time period, that competition was giving price protection as against this future increase?

A. A general recollection, we probably did; yes, sir.

• • • • •

[3236] Q. Now, turning to my inquiry, when you talked to your competitors in this time frame, right here, when you had a report that one or more of them were giving price protection, that is, were going to continue charging a lower price after September 1, 1965, to certain customers, when they said, "No, we are not giving price protection," what did you learn, if anything, besides the fact they weren't giving price protection?

A. May I add a few things?

Q. Sure.

A. The only reason that I would ask about price [3237] protection is if we had a competitive situation where they were asked whether we would grant it based on the competitive situation somebody else had granted, so I would be verifying a specific. I am just talking in general, now.

Q. I can understand that.

A. But I don't remember any specifics.

Q. But when you did it and your competitor said, "No, I am not giving price protection as against this increase right here, September 1, 1965," were you able to form any judgment on the basis of that information?

• • • • •

The WITNESS. If he said he was not?

By Mr. FRICANO:

Q. Yes.

A. I would presume we had an erroneous report, and I would turn it down.

Q. If you had an erroneous report and you turned it [3238] down, would you get any indication from him about—from his answer on September 1, he was also going to increase the price pursuant to his announcement?

A. It would be a presumption. Yes, I think I could draw that conclusion.

Q. would you further draw the conclusion, in addition to putting this price into effect on September 1, that he would maintain that price?

A. I don't know why I would jump to the conclusion he would maintain that price, any more than you know the way prices were going.

[3239] By Mr. FRICANO:

Q. Now did you exchange job price information respective to a competitive situation now, as you have described it, after the time period that the price increase went into effect?

A. If we got a competitive situation, we would verify for job protection after the price increase. In my best recollection, in general, yes.

Q. Now, let's get back to identification of corporations and individuals within each corporation with whom you can contact, discussions, one-two-one contact on job prices. You had named National and identified Mr. Atwell. Anyone else from National?

Mr. HIERING. May we have a period of time?

Mr. FRICANO. While he was general manager of merchandising and vice president of merchandising of United States Gypsum. All these questions are directed to that time frame.

The COURT. You know what that time frame is.

Mr. HIERING. Yes, Your Honor.

By Mr. FRICANO:

Q. Was there anyone else in National other than Mt. Atwell?

[3240] A. That I would verify——

Q. Job price protection.

A. Atwell is the one I would remember discussing it with.

Q. Nothing with Mr. Brown, John W. Brown?

A. I've no recollection.

Q. How about Mr. Nicely?
A. I don't believe I ever talked to Mr. Nicely.
Q. Anyone from Georgia-Pacific?
A. Yes.
Q. Who?
A. I would think Meyer, Al Meyer. It could have been McCaskill.
Q. Was Mr. McCaskill Meyer's superior?
A. To the best of my recollection. I am not positive.
Q. How about Mr. Sikes, S-i-k-e-s?
Mr. HIERING. Objected to on the ground it is cumulative. If we go through each of these with every witness——
Mr. FRICANO. Mr. Bartlit wants the identification of the individuals and now Mr. Hiering says it is cumulative.
The COURT. Go ahead.

By Mr. FRICANO:

Q. Anyone else at Georgia-Pacific besides Meyer and [3241] McCaskill?
A. Nobody I recall offhand.
Q. How about Mr. Fredericks? Do you know him?
A. I met him.
Q. Do you recall whether you had any of these discussions with him?
A. To the best of my recollection, no.
Q. Celotex, anyone at Celotex?
A. Yes, sir.
Q. Who?
A. Mr. Miller.
Q. Don Miller?
A. Don Miller.
Q. He is deceased, isn't he?
A. I believe he is, sir.
Q. Anyone else at Celotex?
A. Not to my recollection.
Q. Mr. Greenwood, vice president?
A. I don't remember talking to Mr. Greenwood.
Q. How about anyone at——
A. In this context that we are talking about.
Q. I am just talking about price protection. How about at Kaiser Gypsum?

A. Yes, sir.
Q. Who?
[3242] A. I would say Mr. Hague.
Q. How about Mr. Costa or Mr. Harper?
A. I don't believe—I don't recall ever talking to them about this subject.
Q. How about Flintkote, anyone at Flintkote?
A. I would presume so. I can't recall the name.
Q. Mr. Malhiot?
A. That name sounds familiar.
Q. Spelled rather strangely, M-a-l-h-i-o-t?
A. It is spelled something like that, I guess.
Q. How about Mr. McDonald at Flintkote?
A. At some period of time it could have been.
Q. How about Mr. Moran at Flintkote?
A. No, sir, I don't remember ever having this—verifying with Mr. Moran.
Q. How about Mr. Pecaro, Chairman of the Board?
A. No, sir, I have no recollection of doing that.
Q. Were any of your subordinates, like Mr. O'Brien, Mr. Weiser, authorized by you to have this kind of a discussion with their counterparts at competitor companies?
A. Mr. O'Brien was. I'm not sure about Mr. Weiser.
Q. Did Mr. O'Brien from time to time have such conversations pursuant to your authorization?
A. My best recollection is that he did.
Q. Now I've asked you questions concerning your [3243] conversations with your competitors. Now did they call you from time to time seeking to obtain from you the same information with respect to job price protection on given competitive situations?
A. My general recollection is yes, they did, sir.
Q. Would the same individuals whom you were calling, be the ones that called you?
A. I presume so, yes.
Q. Now, did Mr. Watt authorize you to do this?
A. It is too long ago to remember whether—when I came in the department, whether Mr. Bear or Mr. Watt instructed me. I can't recall, sir.
Q. Did Mr. Watt know you were doing it?

A. I presume he did, yes, sir.

Q. You say you presume.

A. All right, yes. I worked for him. I wasn't doing things he didn't know about.

Q. You also know Mr. O'Brien was doing them?

A. I have no direct recollection, but I would say yes, sir.

Q. Was Mr. O'Brien also authorized by you to call a competitor, when that competitor—when there was a rumor or report from the field, coming up through the ranks, a report from the field that they were introducing a new product that would be competitive with yours? Was he authorized to check [3244] that out with competitors?

A. You mean to check a general type of situation?

Q. When a new product was coming on stream by a competitor.

A. I would think that he would be authorized to check the price of a new product.

Q. Do you know whether or not in 1964 information came from the field that National Gypsum Company was introducing a new water resistant board into its line which would be competitive with United States Gypsum?

A. I have no direct recollection.

Mr. FRICANO. May the witness have Government Exhibit 250, please.

This document is not in evidence, Your Honor.

Do you have that, Mr. Wolff?

Mr. WOLFF. I don't have it here.

Mr. FRICANO. You don't have it there? I am sorry. We are getting it out of the filing cabinet there. We neglected to put it in the evidence set. My apologies.

By Mr. FRICANO:

Q. Do you have that document now, sir?

A. Yes, sir.

Q. Would you examine it, not that carefully, but just to look through it, because I want to ask you whether or not [3245] you can identify it.

Can you identify it, sir?

A. No, sir, other than to read it.

Q. Well——

A. You mean you want me to tell you what it is?

Q. What is it?

A. It is a memorandum from O'Brien to Weiser and there is some other data, a green sheet and a D.A.

Mr. FRICANO. I offer the exhibit.

Mr. HIERING. No objection.

Mr. DELONE. I will object to the document. If I have the right document, it is a series of writings—unless I have something different than what the witness has—it is longhand memoranda, much more than has been described here. I wonder if I might see what the witness has. Maybe I have the wrong document.

Mr. FRICANO. If Your Honor please, Mr. DeLone is looking at his copy of the same document that the witness has.

Mr. DELONE. I ask Your Honor to look at it.

Mr. FRICANO. This is a file that was kept at United States Gypsum Company. That is why there was no objection by counsel.

The COURT. May I see it?

[3246] Mr. FRICANO. Yes, Your Honor.

Mr. MELLOTT. If Your Honor please, I further object on the grounds the document constitutes hearsay, unless it is offered for a limited purpose.

The COURT. I am going to admit that document for a limited purpose, not to prove the truth of the contents therein, but to establish, tending to establish the procedure that was involved, since this appears to be a business record.

Now I will hear any objections to that rule, if anybody wants to make one.

Mr. DELONE. I don't—this witness, as I understood it, said he doesn't know what the document is and there are longhand notes, scribblings that I don't understand qualify as a business record. Your Honor has looked at it and, again——

The COURT. It appears to me to be a business record of the type that we have had various others offered here on both sides and I am accepting it in evidence not to prove anything that is written there, but to establish a certain procedure, certain type of procedure was carried out or was in existence.

Mr. DELONE. I might say, in all due deference, I don't know that I would offer a document like this.

[3247] The COURT. I didn't say that you had, Mr. DeLone. I said there were documents in evidence now of a similar nature.

• • • • •

[3255] Q. Now, what is National's—if you know—Medicine Lodge f.o.b. prices? What does that signify?

[3256] If you will look at the map, Mr. Gimlin. Here is a pointer. That is a map of all the locations of plants for wallboard as of 1973 as produced by the Gypsum Association.

If you will look at Kansas there, I think you will see a plant that says "National Medicine Lodge."

A. [Witness points.]

Q. Right there. Now, was that plant operating in 1964 at the time when Mr. Weiser wrote this note?

A. I presume it was.

Q. Now, when he says, "National's Medicine Lodge f.o.b. prices on board products are same as ours," what does that mean?

A. It means that their selling price f.o.b. the plant was the same as our selling price f.o.b. Southard, I presume.

Q. SOUTHARD. Can you point to that, the plant right underneath?

A. Yes.

Q. And those two plants covered a marketing area?

A. Yes, sir.

Q. And then, "Therefore, we would equalize with them on items sold on mill base and freight basis."

Do you know what that means?

A. Yes, sir.

Q. What does it mean?

[3257] A. Well, for a period of time we sold our products on a mill base plus freight selling price system.

Q. Would customers buying new products from National and buying the water resistant board—which you are already manufacturing in that market area—then be buying at the same price?

A. Repeat it, please?

Q. Sure. Now, you already had this new product; did you not?

A. Apparently, yes, sir.

Q. And National had just come out with this new product?

A. Apparently.

Mr. DELONE. There is all sorts of things in evidence, but this one I think is objectionable.

The COURT. For the purpose I have stated, it will be admitted.

[Government Exhibit 250 was received in evidence.]

• • • • •

[3249] Q. I ask you to examine in that folder, Mr. Gimlin, the third page from the rear. Do you have that, the third page? It has a date in the upper right-hand corner of August 6th, 1964.

A. That's the second page here.

Q. Oh, I am sorry. All right. Does it have a typewritten—does it have in the explanation part, does it have typewritten in, "This is a new product for National Gypsum"? Does it say that?

A. Down in the body?

Q. Yes.

A. Yes, sir.

Q. Okay. Fine. We are on the same document.

Now, this is a green sheet, is it not?

A. Yes, sir.

Q. All right. Now, what is a green sheet supposed to do?

A. It is a report of a competitive situation.

Q. And where does it come from?

A. Comes from the field.

• • • • •

[3251] By Mr. FRICANO:

Q. Does it indicate a new product?

A. This is a regular green sheet reporting a competitive situation, and it says in the body, "This is a new product for National Gypsum, moisture resistant board."

• • • • •

[3252] The WITNESS. This is a regular competitive report.

• • • • •

A. There is a Mr. Atwell's name at the bottom of the page.

[3253] Q. Now, who was Mr. Atwell?

A. He works for National Gypsum Company.

Q. The same company that was allegedly coming out with this new product, correct?

A. Yes, sir.

Q. Now, based upon Mr. Weiser's note, the information contained in this competitive report, if a customer equally distant—Let's say right here. Between National's Medicine Lodge plant and USG's Southard plant. A customer right smack dab in the middle there wanted to buy this new product. What would his price be from National, and what would his price be from USG? And by that, I mean, would it be the same, different, or what?

A. Well, it would be the same. It would depend on the mill base plus the freight to the point that you picked, and whichever freight was the least, it would be equalized to that freight.

[3258] Q. So the customer would get the board from either plant at the same price?

A. Yes, sir.

Q. Now, was it standard procedure in green sheets, or in files—such as you have before you on this subject——to list a competitor's name on a note?

A. I can't recollect that it was, sir. Are you talking about this note you read?

Q. Yes, sir, Mr. Gimlin.

Now, let's go to the first page. That's a memorandum—is it not—dated September 4, 1964 from Mr. O'Brien back to Mr. Weiser; correct?

A. Right, sir.

Q. Now, September 4, 1964 is just about 5, 6, 7 days after Mr. Weiser had written to Mr. O'Brien; right?

A. Right, sir.

Q. O.K. Now, Mr. O'Brien writes to Mr Weiser and this is what he says:

"National either has or will shortly have a product similar to our WR."

What does "WR" mean?

A. Water repellent.

Q. "Their f.o.b. mill base will be competitive to ours. Their manufacturing and shipping points will match ours. Equalized freight will be added to the mill price, and [3259] equalized freight to be calculated from either the National or competitive mill making the rate." Is that correct?

A. Yes, sir, that's what it says.

Q. How did Mr. O'Brien get that information?

The COURT. If you know.

The WITNESS. I do not know how he got it, sir.

By Mr. FRICANO:

Q. Was Mr. O'Brien empowered to call Mr. Atwell in situations of this character?

A. This is a competitive report, and he would be empowered to verify the competitive situation.

• • • • •

[3261] Q. Now, Mr. Gimlin, what is the date of this sheet?

A. August 6, 1964.

Q. All right; and what does it say?

> This is a new product for National Gypsum, moisture resistant wallboard. They are using Medicine Lodge freight, and this is the reason for difference in price. I heard George McKnight, salesman for National, quote this price to Star Lumber in Wichita, and then Lance Coffey told me he was quoted this price on a job.

Now, that is dated August 6, 1964; is it not?

[3262] A. Yes, sir.

Mr. DELONE. And that shows prices up above, while we are reading it, Mr. Fricano—while we are reading it, will you read that?

Mr. FRICANO. $86.75, $87.36, and $86.75 on one-half-inch water resistant sheetrock."

Mr. DELONE. Thank you.

By Mr. FRICANO:

Q. Now, this is a report from the field; is it not?

A. Yes, sir.

Q. And this went to Mr. Weiser; did it not?

A. Yes, sir.

• • • • •

[3267] Q. • • • Did you obtain a field report, from time to time, that your competitors were changing their prices?

[3268] A. That they were changing their price?

Q. Yes, sir.

A. To my best recollection, yes, sir.

Q. Did that come in the form of green sheets?

A. Generally speaking, yes, sir.

Q. Were your staff people empowered to call up that competitor to find out what the price was, where it was effective, and so forth?

A. You mean if they had a report that a competitor had changed his price?

Q. Yes, sir.

A. Were they able to verify whether they changed his price?

Q. Yes, sir.

A. Yes, sir.

• • • • •

Q. United States Gypsum was changing its price, for purposes of illustration—do you recall a price change by [3269] United States Gypsum on December 15, 1965?

A. Yes, sir.

Q. All right. Now, using that—and you were the first ones to announce that price changes; were you not?

A. I believe we were; yes, sir.

Q. All right. Now, would your competitors, given that fact they had a price sheet or a document indicating a change of price by United States Gypsum, then, call you to ascertain, one, the prices and, two, where they would be effective?

Mr. MELLOTT. If the Court please, I object to the form of that question. It seems to me that calls for speculation. You can ask the question as to whether they did or not, but, certainly, not "would they."

By Mr. FRICANO:

Q. Did they?

A. Did they call and ask our prices after we had announced the price change?

Q. Yes, sir.

A. I have—in general, my recollection is that they did.

[3270] By Mr. FRICANO:

Q. Did each of the men whom you identified as exchanging price information with, call you from time to time to get this kind of information from you?

A. My best recollection is that they did.

• • • • •

Q. • • • I direct your attention back to job price protection for a moment. Within your experience now, as director of merchandising and vice president of merchandising at United States Gypsum, can you tell us what effect, if any, large amounts of job price protection in the field would have on a coming increase in price?

A. You mean if there was a lot of job protection after [3271] an effective date of a price increase?

A. Before an effective date. Before—you mean if a lot had been granted that carried beyond the effective date?

Q. Yes, sir.

A. The tendency would have been to have a lot of board in the market at a protected price or lower price previous to the price increased price.

Q. Would this have any effect on the price increase?

A. Yes, sir.

Q. What kind of effect?

A. It would tend to weaken it and many times probably affect your ability to get a price increase through, there is so much board there at the old price.

• • • • •

[3277] Q. • • • Now, when job price protection, as you have described it, was extended from time to time to customers, was there any kind of contract signed?

A. A written contract?

Q. Yes, sir.

A. Not to my recollection, sir.

Q. What kind of commitment, if any, was there?

A. It would be a verbal commitment.

Q. Did you have customers that purchased not only from you, United States Gypsum, but also from the other major producers?

A. I am sure we did, sir.

Q. At the same time?

A. Yes, sir.

Q. Now, when there was an exchange of information relative to job price protection between United States Gypsum and its competitors, was that information concerning exchange equally available to customers?

A. To my best recollection, no sir.

Q. Did your customers, your joint, mutual customers, know that you, United States Gypsum, and competitors were exchanging information with respect to their requests for job price protection?

A. To the best of my knowledge, no, sir.

Q. Was this exchange of such information limited to [3278] a close-knit group within United States Gypsum?

A. Maybe you better define close-knit.

[3279] By Mr. FRICANO:

Q. All right. Did it extended beyond you, your two immediate subordinates, O'Brien and Weiser, Watt and Morgan?

A. To the best of my recollection, generally speaking, no, but there would be occasions where somebody else might know about it, I am sure.

• • • • •

[3294] The COURT. The applicator, I assume, is the one who puts the board on?

Mr. FRICANO. Yes, Your Honor.

The COURT. He applies the board. What you are asking is: Is there some relationship between the manufacturer and that applicator directly, rather than merely through the dealer?

Mr. FRICANO. That's exactly what I am trying to say.

The COURT. Does anybody want to object to that?

Mr. WARNKE. I object, Your Honor. It is a legal question that calls for legal conclusion. There is quite a body of law on this that has been developed by the Federal Trade Commission.

Mr. FRICANO. I am sorry. I am not as learned as Mr. Warnke.

Does Your Honor rule that he can answer the question?

The COURT. I asked you to put it the other way. Ask what the relationship is.

• • • • •

[3304] Q. Yesterday, Mr. Gimlin, you testified that you had an understanding with your competitors concerning the exchange of prices and other competitive matters. Do you recall that?

A. Yes, sir.

Q. Was this understanding which you had limited to any geographic area in the United States?

A. No, sir, not to my recollection.

Q. Would it have included the western portion of Pennsylvania, that is, customers located there?

A. Yes, sir.

• • • • •

[3306] Q. Now, can you tell us with what degree of frequency you had these conversations with your competitors? Now, this is the time period, now, between 1962, when you became director of merchandising and, of course, when you resigned in January of 1966.

A. I have no direct recollection. All I could give would be a general recollection, at this time. It would vary dramatically, and there might be none for a week, and then, some days, there would be quite a few contacts, but it was up and down, and I really couldn't put a number with any accuracy on it.

Q. Was it tied at all to the degree of pricing activity in the marketplace?

A. Yes, sir.

Q. In what way? Would you explain your answer?

A. Well, after a price increase went into effect, there would be more frequency of checking competitive situations, after that period of time, you would get more reported to you, and that sort of thing.

Q. Was there—if we take the year 1965, for example——

A. Yes, sir.

Q. Were there, and by comparison to the year 1962?

A. Yes, sir.

Q. How would you compare those two years with the degree of frequency?

[3307] A. There would definitely be more in '65 than '62.

Q. By the way, do you know Mike Simpson?

A. Yes, sir; I do.

Q. And who is he?

A. He is now, or then?

Q. Then.

A. Then he was—he was either president or an officer in Republic Gypsum Company.

Q. Did you, from time to time, exchange prices and other information with Mr. Simpson?

A. My general recollection; that's right, yes, sir.

• • • • •

[3310] By Mr. Fricano:

Q. Referring now to the period '62 and '63 when you resigned. And when I say, "when did the exchanges occur?" was it face to face, over the telephone, meetings, or in what context?

A. Generally the bulk of them occurred in telephone conversations.

Q. When you had these telephone conversations, was there anyone else present in the room with you listening to your end of the conversation?

A. Not to my recollection, sir.

Q. All right. Did the party to whom you were speaking indicate at any time during the course of the conversations that he had someone listening to him at his end?

A. I have no recollection that that ever occurred.

Q. Did they ever occur at the occasion of a Gypsum Association meeting?

A. My general recollection is that at times you might engage in a price verification conversation at a Gypsum Association meeting.

Q. You saw these people when you wanted then?

A. Yes, sir.

Q. Now, of course, they had an annual meeting in the spring in Chicago; did they not?

[3311–3312] A. Yes, sir.

Q. And that's where United States Gypsum was located—is it not—in Chicago?

A. Yes, sir.

Q. The Association headquarters are in Chicago, and U. S. G.'s headquarters are in Chicago; right?

A. Yes, sir.

Q. And then they had a semi-annual meeting in the fall or early winter at some resort area; is that correct?

A. Yes, sir.

Q. And you saw these people at those times; correct?

A. Yes, sir.

Q. Now, how would this be done at a Gypsum Association meeting? And by "how" I mean to say: Would it be done in a group or individually, or in what fashion?

A. My best recollection would be that it would be done individually, much like a phone conversation. Somebody would ask you a question.

• • • • •

[3315] Q. Tell us what you mean by "exchanging of price with a competitor."

A. I am talking about a price verification where I have asked him a specific question as to that I have a competitive situation and the price is so and so, and do you have that competitive situation? That type of an exchange of price information.

Q. All right.

Now, yesterday you testified that from time to time when there was a price announcement by United States Gypsum in the field, your competitors would call you to find out where it was going to be effective and what your prices were. Do you recall that testimony?

[3316] A. Yes, sir.

Q. Now, is that an exchange of prices?

A. That would be an exchange of prices, yes, sir.

• • • • •

Q. Did you, at the time when you engaged in the buy-sell business dealings that you had with your competitors, the other major producers, did you attempt to ascertain from them prices?

A. My general recollection is no, that it was a buy-sell agreement.

[3317] Q. Did they try to ascertain prices from you?

A. Again my general recollection is no, sir.

Q. Now, when you had these conversations, whether they were at Gypsum Association meetings or over the telephone, did you make any notes that—for example, "I spoke to Ken Atwell and he told me thus and so."

A. No, sir.

Q. Did you keep any record at all of these telephone conversations or these verifications, as you term it?

A. No, sir.

• • • • •

[3320] Q. Can you tell us why you didn't?

A. Why I didn't what, sir, have any knowledge of what they were doing?

Q. No, no, why you didn't make a little notation when you talked to these people.

A. I just—I really don't have a good explanation. I didn't see any reason to do it.

Q. When competitive activity was particularly intense in the marketplace, did you spend a great deal of time on the telephone talking to your competitors about these matters?

A. A great deal is an elusive term.

Q. Let's put it a different way.

A. I don't have any recollection that far back that I could define it for you precisely.

Q. Perhaps I can rephrase my question, Mr. Gimlin.

When you did have a lot of conversations on a given day, would it have taken you all day or the better part of the day to make these notations, if you had made them?

A. We had an awful lot of paper. You have seen the records. There were a lot of green sheets and competitive forms, plus a lot of other papers. It would have been an [3321] added chore that would have taken a lot of time.

Q. This was because of the frequency of the telephone calls?

A. At some point in time there were a lot of calls and it would have taken a lot of time, plus there were a lot of documents circulating through the department that weren't checked. You know, there are a lot that weren't verified.

Q. I am only talking about the ones that were checked. Do you understand that?

A. Right, sir.

Q. All right.

When you called them, you had these documents in front of you, did you not?

A. Yes, sir.

Q. So, if you had taken that pencil, zap, one note, one word, couldn't you?

Mr. HERRING. I object. He has asked that question and it is obvious, anyway.

The COURT. Then why are you objecting, if it is obvious anyway?

By Mr. FRICANO:

Q. You could have done that?

A. Yes, sir.

• • • • •

[3322] Q. Now your interrogation today with respect to this exchange has dealt with job price protection, prices and I think that is about it. I would like to ask you, did you exchange any other types of competitive information, other than job price protection and just prices per se?

A. Yes, sir, terms of sale.

Q. What do you mean by terms of sale?

A. They are the 2 per cent 10—I don't remember the exact terms, but 2 per cent 10 and 2 per cent 30.

Q. By 2 percent 10, do you mean the cash discount a customer would get if he paid his bill by a certain amount of time?

A. Right, the amount of discount and the time in which he would have to pay.

• • • • •

[3323] Q. Did you ever check with one another on the boundaries of a zone?

A. Yes.

Q. Zones didn't always follow states, did they?

A. No, sir. They generally followed the trading areas.

• • • • •

[3334] Q. Now, would you, from time to time, in those areas, when one of your competitors trucked, check that out with them?

A. Yes, sir. We would verify his trucking price into the market.

Q. At the time of price changes, did you, as a matter of practice, exchange your price sheets with your competitors?

A. To the best of my recollection, we did, sir.

• • • • •

[3337] By Mr. FRICANO:

Q. Now, from time to time when your competitors called you in this time period and asked you about a price or a competitive situation of which they had a report, did you refuse to tell them?

A. There were some situations where we didn't answer, yes, sir.

Q. Why not, sir?

A. Well, there were some accounts where we had a policy of not discussing, didn't feel it was in the company's best interest to discuss.

Q. What kind of accounts were they?

A. They would, generally speaking, be bigger accounts. I can't—I have no direct recollection of how many or anything, but the bigger accounts. Or, a big account.

Q. Market leaders?

A. Well, they would be big. I don't know if they would necessarily be a market leader. But if the same connotes the same, they would be market leaders.

Q. Could you identify some of these customers that you refused to answer on?

A. Well, the one that comes to mind is Wicke's. Direct recollection. I better stop there. I remember Wicke's, and I would be speculating on others.

Q. All right. Did anyone instruct you not to give [3338] this information out to your competitors with respect to Wicke's?

A. My best recollection is that Mr. Watt instructed me that we shouldn't exchange information on Wicke's.

Q. Did he tell you why?

A. I can only give you a speculative answer. I guess you don't want that. I don't recall—the discussion. I remember the instruction, but not the discussion, and I——

Q. He did give a reason, but you don't remember why; is that your answer?

A. Yes, sir.

Q. From time to time did your competitors—when you called them—refuse to give you the information?

A. I have no specific recollection, but I am sure there probably were instances where they may not have given us the information.

Q. Did you ever ask them why they weren't giving you the information?

A. No, sir, not to my recollection.

Q. Did they ever ask you why?

A. No. I don't remember that. I have no recollection that they asked why, sir.

Q. Now, when you asked them and they refused to give you the information, did you draw any conclusion in your own mind from that refusal?

[3339] Mr. DELONE. Objected to as immaterial.

The COURT. Overruled.

The WITNESS. Would you repeat it, sir?

By Mr. FRICANO:

Q. Sure. When you called them and they refused to give you the information, did you form any conclusion in your mind?

A. I have no direct recollection of a conclusion that I would have formed.

Q. Do you have a general recollection?

A. I guess they just didn't want to talk about it for some reason.

Q. Well, you didn't want to talk about it for some reason either; did you?

A. No, sir.

Q. How do you distinguish between an exchange of information on prices with your competitors over a period of time where you both each told each other the data that you wanted to have, and yet from time to time you wouldn't do it?

Mr. MCSWEENEY: I object to that. It is irrelevant and immaterial why.

The COURT: Overruled.

The WITNESS: Well, let's get back to the Wicke's case. This was a big customer. It was an important customer to us. A competitive—And I had no first-hand [3340] knowledge. I didn't deal with Wicke's, but we had established a competitive

situation and met a price. At least we got a price acceptance, a price adjustment in our department, and I wasn't directly involved in these. And I am sure that it was, we wanted to keep it confidential; because I am not sure how we got the information, but we wanted to keep it confidential.

By Mr. FRICANO:

Q. You didn't want your competitor to meet that deviation; did you?

A. Well, obviously we just as soon he didn't, I guess.

Q. And a point of fact, Mr. Grimlin, that was a deviation, and you weren't meeting a competitive situation when you gave the deviation; were you?

Mr. HIERING. Your Honor, I object to this. I don't know whether he is asking him about Wicke's, but if he is, the witness has said that he wasn't involved with it, that he doesn't know anything about it. And now without any foundation at all he is asking him this kind of a conclusory question. I object to it.

The COURT. Overruled.

The WITNESS. I have no direct knowledge of the Wicke's situation. My best recollection is that we had the price adjustment, and I assume that we had a competitive situation.

[3341] By Mr. FRICANO:

Q. You assume?

A. Yes, sir.

Q. You mean somebody else was charging that price, so you met it?

A. Somebody else was establishing the basis for us to give the price adjustment.

Q. Mr. Gimlin, you were Vice President of Merchandising; were you not?

A. Yes, sir.

Q. All accounts came under your general supervision; did they not?

A. No. The Wicke's account didn't, other than the mechanics of handling the paperwork.

Q. Well, Mr. Stephan handled the Wicke's account; didn't he?

A. Yes, sir.

Q. And he was the National accounts manager; wasn't he?

A. Yes, sir.

Q. All right. Did you ever talk to Mr. Stephan?

A. Certainly.

Q. Did he not tell you from time to time that with respect to the National accounts that USG had a special dealing with them?

[3342] A. I would get the price exception. I didn't discuss with Mr. Stephan. I knew that we had a price, and it came down approved, and we implemented it. But I didn't get involved in the discussion.

Q. All right. Now, if you wanted to keep it confidential, if you were meeting a competitive situation, what difference does it make if you told him?

A. Well, we got the information—I don't know how we got the information, so I was just respecting my instructions, sir.

Q. From Mr. Watt?

A. Yes, sir.

Q. Now, when you did give out information, when they called you or when you talked with them at a Gypsum Association meeting—or wherever—were you honest, Mr. Gimlin?

A. Yes, sir.

Q. Did you believe your competitors to be honest when they talked to you?

A. Yes, sir.

Q. Why were you honest?

A. Well, we wouldn't——

Mr. MCSWEENEY. I object to asking him personally why he is honest.

Mr. FRICANO. In this context, Your Honor.

The COURT. Go ahead.

[3343] The WITNESS. We were asking them to verify a situation, and wanted them to verify truthfully, and we would do the same thing.

By Mr. FRICANO:

Q. Now Mr. Gimlin——

A. Yes, sir.

Q. What was the purpose of United States Gypsum engaging in this practice, thisunderstanding of exchanging this kind of information we have been talking about?

A. So we wouldn't be over-competitive on price.

Q. Did this practice tend to limit the amount of discounts that tended to creep into the market?

A. The amount of discounts?

Q. Yes, sir.

A. Yes, sir, you wouldn't be over-competitive.

Q. Did it have the effect then of stabilizing prices?

A. Well, to the extent that you weren't over-competitive it would. It could be interpreted that way, yes, sir.

Q. Now, back to the zone thing for a minute, Mr. Gimlin. I can't find Minneapolis on here.

A. Here.

Q. In Minneapolis there are two cities; aren't there? Minneapolis and St. Paul. Where are the twin cities, anyway?

A. Here.

Q. Minneapolis and St. Paul.

[3344] Now, do you recall whether or not Minneapolis and St. Paul were in a zone?

A. I don't recall, but I would say they must have been.

[3345] By Mr. FRICANO:

Q. Now, a price in Minneapolis to a customer, if it was $50 a thousand, would that also be the price to a customer in St. Paul, $50 a thousand?

A. I would think so, yes.

Q. All right.

Now, if a price deviation were given to the customer in Minneapolis, say 5 percent off the bulletin price of $50, and that became known in Minneapolis, would that price have a tendency to spread within the city, the lower price?

A. When you became known, known to who?

Q. Other dealers, other competitors.

A. Yes, sir.

Q. Now, if it spread within Minneapolis, would the customers in St. Paul ultimately get that lower price?

A. If it spread and you got more deviations in Minneapolis, you tend to pick them up, more deviations in a period of time, in St. Paul, because they are a trading area.

Q. Now, is it fair to state then that when you have two large cities that are side by each, as it were, that prices in one city would affect prices in the other city?

A. When they are that close. That is what I meant before by trading areas, marketing areas.

[3346] Q. How about zones that are next to each other? Do the prices in one zone have a tendency to affect the prices in another zone?

A. Not too much. You try to draw the zone lines so you won't get a trading area in two different zones, with two different prices.

Q. I understand that, but from time to time if the pricing level dropped in one city, would that have any affect on the prices in those zones that butt up against it?

A. Logic dictates in time it would.

Q. Now, how would a competitor, aside from the telephone calls and so forth, how would a competitor of yours ascertain a deviation from a list price?

A. You had better repeat that for me.

Q. Sure.

From time to time how would—let's work it this way: Let's work it through United States Gypsum. How did United States Gypsum ascertain from time to time a deviation from a list price?

A. From our customers.

Q. What would he do? Would he tell you?

A. He would tell the salesmen.

Q. He would say he had a better deal from somebody else, is that right?

A. Yes, sir.

[3347] Q. Did the salesmen try to get any proof of this?

A. Yes, sir.

Q. What did he try to get?

A. He would try to get varying types of proof, an invoice, a credit memo, a signed statement from the dealer that he had such an arrangement.

Q. Now, from time to time you got invoices, did you not?

A. Not too often, but sometimes. We got them sometimes, yes, sir.

Q. When you got them, did you believe them?

A. When we saw an invoice?

Q. Yes.

A. Yes, we would believe it and use it as a documentation for a competitive situation.

Q. Mr. Gimlin, when you did get an invoice, did you not also, in addition, call your competitors from time to time and check that invoice out?

A. We got so few, I have no recollection of calling a competitor to check an invoice.

Q. Mr. Gimlin, was it the practice at United States Gypsum from time to time not to give the right price on an invoice?

A. By right price—the invoice would always show the bulletin price. It would also show a discount to meet, [3348] you know, for whatever reason we had extended the discount, so that to that extent, that is what the invoice showed.

Q. Let me rephrase my question.

Mr. HIERING: Your Honor, I don't think the witness has finished his answer, Your Honor.

The WITNESS: That is what the invoice would show. So, to that extent, it was showing the right price.

Maybe you better ask me, so I am answering the right question.

By Mr. FRICANO:

Q. I thought you misunderstood me, Mr. Gimlin. That is why I interrupted you.

Did United States Gypsum from time to time give deviations from its bulletin prices?

A. Yes, sir.

Q. Were those deviations from bulletin prices also shown on invoices?

A. No, sir.

Q. What was shown?

A. The bulletin price.

Q. Which was a fictitious price?

A. It was the bulletin price. When you say fictitious, I don't consider it fictitious.

Q. It was the price in the bulletin?

[3349] A. Yes, sir.

Q. But it was not the price the customer was paying?

A. No, sir.

Q. Why didn't you just put the discount right in the old invoice, Mr. Gimlin?

A. Well, some of the customers preferred to get it by credit memo at the end of the month, and it—that is one reason. I guess that—that is the main reason that I can recall offhand.

It also would tend to limit in the description you outlined before, there would be less documentation of a lower price to other people.

Q. If the invoices got out showing deviations, the market prices might drop, isn't that right?

A. You would get more requests on competitive situations, yes, sir.

Q. Dealers have associations, don't they?

When I say dealers, your customers have associations?

A. I have no direct recollection of a customer association.

Q. Do you have any recollection at all, Mr. Gimlin, for some strange reason when a dealer gets a cut price, he spreads the word around?

A. I have a recollection there was a lot of word spreading around, yes, sir.

[3350] Q. Now if you were not putting the deviations on an invoice, do you know whether or not your competitors were doing the same thing?

A. I have no direct knowledge, no, sir.

Q. Did you always trust their invoices, Mr. Gimlin, when you got them?

A. As I testified, I think, we got them rarely. If I got one, to the extent that you have now outlined it, no. If I had a deviation on it, I would trust it.

Q. If it didn't have a deviation, you wouldn't trust it?

A. I don't know that I would have gotten it, if it didn't have one, because it wouldn't be proving anything.

Q. Now did you, from time to time, in these situations when you did not put the real price that the man was paying you on the invoice, give him a cashier's check?

A. There were some instances where cashier's checks was the form of payment on that credit.

Q. What is a cashier's check?

A. It is a check drawn by a bank.

Q. Does it have any identification on it at all as to the person who drew the money out of the bank to put into that cashier's check?

A. I am no financial expert, but my understanding is no, it has not.

[3351] Q. It is untraceable, isn't it?

A. To the best of my knowledge.

Q. Do you know whether your competitors also gave cashier's checks?

A. I don't have any direct recollection whether they did or not, sir.

Q. Did you make a business judgement when you were at United States Gypsum as to whether or not your competitors were issuing cashier's checks?

A. I have no recollection of making such a judgement.

Q. Now, in those situations where you gave a discount from the bulletin price and where that discount did not show on the invoice, if your competitor called you with respect to that because your customer told his salesman that you, U. S. G., was giving a discount, would you admit that to your competitors?

A. That is a price verification.

Q. Yes.

A. If he called and asked me, yes, I would tell him.

Q. Notwithstanding the fact you did put that real price on the bulletin?

A. Yes, sir.

Q. So the information was available to your competitors, but it was not available to all dealers in the marketplace, isn't that correct?

[3352] A. You mean the finding out for sure?

Q. Yes.

A. Yes, they couldn't verify.

Q. Customers didn't know it was going on, did they?

• • • • •

Q. Now did you ever provide competitors with advance information regarding your intent to make a price change in the future?

A. Advance information?

Q. Yes.

A. No, sir.

• • • • .. •

[3354] Q. All right. Did you trust all your salesmen at United States Gypsum to tell you the truth?

A. We trust them all to tell the truth. The truth about what, sir?

Q. About competitive deviations in the field.

[3355] A. No, the information that we got from them, I am sure they were relaying in good faith, but I didn't trust, you know, that all that we got in was bona fide de facto.

Q. Did Mr. O'Brien ever express an opinion to you as to whether or not he trusted the salesmen?

A. Yes, sir, I think he did.

Q. What did he say, your subordinate?

A. He didn't trust all the salesmen, either. When I say "trust," I am talking about reliability of information.

Q. That's what I meant to convey, and I am sorry if I conveyed anything else.

In the exchange of the information, did you, at times, give an explanation as to why you were deviating from a particular policy or practice?

A. I have no recollection of ever giving any explanations.

Q. Well, were you ever asked for an explanation, "Why are you doing this, Mr. Gimlin?"

A. I have no recollection of being asked specifically why we——

Q. Do you have a recollection of volunteering the information?

A. No, sir, no recollection.

Q. Well, did the people with whom you spoke ever volunteer explanations as to why they were doing a particular [3356] thing?

A. I have no specific recollection, sir, of anybody volunteering information.

Q. Well, from time to time, when a competitor asked you if you had five percent off—by the way, what does that mean, five percent off?

A. Five means five percent off the bulletin price, a discount of five percent off the bulletin price.

Q. Did United States Gypsum have any policy with respect to its list prices?

A. It sold at the bulletin prices, unless to meet a competitive situation.

Q. Did your competitors have similar policies?

A. To the best of my general recollection, yes, sir.

Q. And how did your prices, your bulletin prices, compare with their published prices?

A. Generally the same, sir.

Q. Now, from time to time, when they called you, when you called them, did you use terminology such as five percent off or two fives off, as the case may be?

A. My best general recollection, yes, sir, we would.

Q. And did you also, from time to time, both ways, use an actual figure?

A. Yes, sir.

Q. By "an actual figure," I mean a dollar and cents——

[3357] A. To dollars a thousand off, or something like that.

Q. Yes. Well, from time to time, when you were called and when you called them, was there, in fact, a deviation, but the information was faulty, that it wasn't as great or it was more than the one that was reported?

A. Yes, sir. There would be occasions when it wasn't correct.

Q. All right. Now, if the information that the competitor was asking you for was—that he had incorrect information, let's say, for the purposes of this example, instead of two dollars a thousand off, five dollars a thousand off—I withdraw that. Instead of five dollars a thousand off, it's actually three dollars a thousand off, and he says to you, "Mr. Gimlin," or "Bob," if he is your buddy, "are you giving the XYZ Lumber Company five dollars a thousand off?" What do you tell him?

A. No.

Q. Do you tell him what you are giving off?

A. I have no recollection of telling him. He probably asked me, "Do you have a discount with XYZ Lumber Company?" I would say, "Yes."

Q. Would you then give him the amount?

A. And if he said, "What is the amount," I have a general recollection that we might tell him.

[3358] Q. All right; and would you ask them the same, for the same information, and would they tell you?

A. In that same retrace of questions?

Q. Yes.

A. My general recollection is that, yes, they would.

Q. Would that also be true for extended credit terms, where the information wasn't accurate?

A. Where you might ask successive questions?

Q. Yes.

A. My general recollection is that that could probably be true, too, sir.

Q. Well, these weren't sterile conversations, were they, Mr. Gimlin?

Mr. McSweeney. I object to the characterizations of the conversations.

The Court. Sustained.

• • • • •

[3359] Q. Oh, we now have the specific date, April 28, 1965.

Do you have an independent recollection that at or about this time, Georgia-Pacific did acquire Bestwall?

A. In about that period of time; yes, sir.

Q. Did this information become known generally within United States Gypsum?

A. Yes, sir—that G-P was going to purchase Bestwall; yes, Sir.

Q. Did you have any discussions with Mr. Watt and Mr. Morgan concerning this acquisition?

A. My general recollection is that it was a new competitor, a change of competitors.

Q. Did they pose any kind of a different problem for you, or did you anticipate that they might pose a different [3360] kind of a problem for you than your other major competitors?

A. Georgia-Pacific would have been the first major competitor that had a lot of warehouses, so we would wonder how they would market their product.

Q. They had warehouses all over the country; didn't they?

A. They had a lot of warehouses. I don't know if they were all over the country.

Q. And prior thereto—I just want to just flash back, just for a quick moment.

Would this be at all analogous, Georgia-Pacific's warehouses to Texas Gypsum's trucking, something different?

A. The fact that they had the warehouses was something different.

Q. Now, did you ever discuss with your competitors at Gypsum Association meetings or elsewhere this acquisition of Bestwall by Georgia-Pacific?

A. I have no recollection of ever discussing it; no, sir.

Q. Well, did you ever discuss it with Mr. Hunt and others—by the way, who is Mr. Hunt?

A. Mr. Hunt was the—either the president or the chairman of Georgia-Pacific.

• • • • •

[3363] Q. Now, do you recall at this time when you were in [3364] Portland on February 16, 1965, that you had a four-and-a-half hour meeting with John Brown of National Gypsum Company and Pete Oldham of Evans Products, and William Hunt, president of Georgia-Pacific?

A. Yes, sir.

Q. Now, just how did you happen to meet with all these people at this time, February 1965, just a month-and-a-half prior to Georgia-Pacific's acquisition of Bestwall?

A. I was in Portland with Mr. Lane to attempt to sell tile products, the Georgia-Pacific warehouses handling some of their products principally on the West Coast. Went by to see Mr. Swanson, who had the decision-making, to try to sell him to handle more of our products.

And I have a recollection of meeting John Brown in the airport. He asked me what I was doing for dinner, and I went to dinner with him and Mr. Hunt, and—the other gentleman's name escapes me—was there.

Q. Is it your testimony that this was not a prearranged meeting, you just bumped into Mr. John Brown at the airport?

A. That's my testimony, sir.

Q. Now, Mr. John Brown is from Buffalo; isn't he?

A. Yes, sir.

Q. And he was Vice President of National Gypsum, your competitor; wasn't he?

A. Yes, sir.

[3365] Q. So he came 3,000 miles to Portland and you just happened to bump into him at the airport; is that right?

A. That's my testimony, sir.

Q. And then you went to dinner with Mr. Hunt and Mr. John Brown; correct?

A. And the other man.

Q. And the other man, that's right.

A. Right.

Q. What did you talk about?

A. I have no recollection what we talked about, sir. It was a social dinner and I have no recollection.

Q. Did you talk business?

A. Oh, we must have talked business of some sort.

• • • • •

[3367] Q. Do you know whether or not in January, the previous month, now, January, 1965, Mr. Shaver, who was then Chairman of the Board of United States Gypsum, correct?

A. Yes, sir.

Q. And Mr. Morgan, who was then President of United States Gypsum, correct?

A. Yes, sir.

Q. And Mr. Hunt, who was then President of Georgia- [3368] Pacific Corporation, correct?

A. Yes, sir.

Q. And Mr. Flowery—who is Mr. Flowery?

A. He was an executive of Georgia-Pacific. I don't know his capacity.

Q. Do you know whether on January 4, precisely January 4, 1965, one month before your meeting with John Brown and Bill Hunt, that these men met together?

A. No, sir.

Q. Do you have any recollection of that at all?

A. No recollection whatsoever.

The COURT. Ladies and gentlemen, you will remember in my preliminary charge I told you that it is the answers that are evidence and not the questions. I remind you that you can't find, for example, that there was such a meeting from the fact

that the question was asked, when the witness says he doesn't remember.

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[3386] • • •

Q. Now, has it been your experience, while you were at United States Gypsum, that price increases had a tendency to stick—as it were—to hold when demand is high?

[3387] A. Yes, sir.

Q. And has it also been your experience that when demand is off price increases have a tendency not to stick?

A. They would be more difficult, yes, sir.

Q. Did United States Gypsum, in the summer-fall of 1965, compute how much money it was losing as a result of the sales being off?

A. We made many studies during that period of time as to volume sales, profits, that sort of thing.

Q. Did you try to project into the future what would happen if sales continued to be off and prices low?

A. We made lots of studies and lots of projections during that period of time as to our business, yes, sir.

Q. Did Mr. O'Brien come up with a—your subordinate now——

A. Yes, sir.

Q. Did he come up with a study which was discussed by you with Mr. Watt and Mr. Morgan, whereby—proposal whereby you would increase the prices throughout the country on various zones throughout the country, and if that price increase stuck, then you would then realize something like ten million dollars in profits but you wouldn't sell as much board?

Mr. BARTLIT. Your Honor, could I have the question read back? I lost the context.

[3388] [Last question read.]

The WITNESS. I remember him coming up with a study, because we were discussing and evaluating a study. I have no recollection of the specific figures at this time.

By Mr. FRICANO:

Q. Well, do you have a general recollection that if the price increase stuck, the contemplated price increase, that profits would go up but you wouldn't be selling as much wallboard?

A. I know if the price increase stuck profits would go up. I don't remember all the factors he put into the study, but there were a lot of factors in the study.

Mr. FRICANO: May the witness have 410.

By Mr. FRICANO:

Q. Do you have that, sir?

A. Yes, sir.

Q. Can you identify that document? I ask you to take a look at it.

Have you looked at it now, sir?

A. Yes, sir. I have.

Q. Can you identify that document?

A. It looks like a working document from our department during that period of time entitled "Review Of Price Strategy."

[3389] Mr. FRICANO. I offer the exhibit.

Mr. HIERING. Your Honor, I note that it has got a line scratched right through the first page, but I have no objection to it.

The COURT. All right. Then it will be admitted.

Mr. FRICANO. Thank you, Your Honor.

[Government Exhibit No. 410 was received in evidence.]

By Mr. FRICANO:

Q. Now, I direct your attention to page 5. And just so that I can get into this document to try to speed up this thing——

A. Yes, sir.

Q. Do you recall whether or not this is one of the documents that laid out the plans and the strategies for the December 15, 1965 price increase?

A. This would be one of a package of documents that we were probably working on.

Q. Now, that says on page 5—and I quote:

> How it works. Our new policy will be announced November 11 to the Wall Street Journal, and letters to the trade will be mailed on that date. No price protection will [3390] be given to dealers, and generally a no-protection policy will be adopted.

However, to avoid hardships and deep-seated ill will from customers who face significant losses on firm price, and wherein the company has some legal and/or moral involvement, protection on jobs will be judiciously considered and granted. A list of the commitments to include price and estimated quantity will be compiled and made available to competitors in Chicago by December 15.

Then it says: "Results. It is most difficult to estimate results due to competitive reaction and strategy."

Mr. Gimlin, if your competitors didn't go along with this, could you have made this increase stick?

A. I doubt it on a commodity like gypsum board, no, sir.

• • • • •

[3413] By Mr. FRICANO:

Q. Mr. Gimlin, when you testified on salesmen, did you not testify that the information which they were providing, their information, not what they were getting from their customers, was not accurate; that you couldn't trust that?

A. Well, their information was generally coming from their customers. We were getting reports that this is what they were told, and they were relaying that on to us.

Q. Yes, sir, but didn't you testify just a few moments ago that the salesmen themselves had a tendency not to give you accurate information on deviations?

A. I think we should restrict that to a small—there could be occasional salesmen who might not give us accurate—but the bulk of our salesmen gave us the information as accurate as they got it, sir.

Q. Well, you said Joe O'Brien didn't think so.

Mr. HIERING. Oh, Your Honor, I object to this.

The COURT. Well, let's not argue.

By Mr. FRICANO:

Q. Well, in any event, whether there was one salesman or three hundred salesmen, is that fact in this letter?

Mr. BARTLIT. Your Honor, I object to [3414] the intimidating tone of your voice. Your Honor has instructed us all to be courteous to witnesses, and I think that Mr. Fricano should observe that as well as everybody else.

The COURT. I would like everybody to be courteous to everybody.

Mr. FRICANO. Mr. Gimlin, if I appear to be discourteous to you, sir, I apologize.

The COURT. All right. Now, ask the question without the pressure.

By Mr. FRICANO:

Q. Mr. Gimlin——

A. Yes, sir.

Q. [Continuing.] Did Mr. Watt include anything in this letter about your salesmen?

A. No, sir.

Q. Did your letter to Mr. Dierks include anything about your salesmen?

A. No, sir.

• • • • •

[3451] • • •

Mr. DELONE. Yes, sir. I, too, get tired of being embarrassed in front of the jury, and that's what I wanted to speak to Your Honor about here.

The COURT. We are all in the same boat in that regard.

Mr. DELONE. Well, there are two things [3452] that happened this morning, and I didn't want to raise them until I had checked to make sure my ears did not deceive me.

I have made the best check I can without having the transcript before me, but there are two things that Mr. Fricano did in the presence of the jury this morning that in my judgment are a serious breach of what is required of the prosecutor in this case.

At one point, he was asking Mr. Gimlin a question about whether he received calls from his competitors, and he said, as best I reconstruct it without benefit of the transcript, "When your counterparts of your competitors called to you, Mr. Gimlin," he said, "oh, they said Bob; they were your buddies." And then he went on and said did they say so and so.

Now, there was no reason for the interject on of "they were your buddies," except that he is over-zealous and irrepressible, and, then, when he was examining Mr. Gimlin——

The COURT. I think Mr. Fricano will admit that he is temperamental and irrepressible.

Mr. DELONE. He is, and I agree with that, and I accuse him of nothing more, and I want to make that clear, but I still have to worry about how that strikes the jury.

There is no occasion for a comment about "your buddies," and that does hurt the Defendants, in my view.

[3453] The COURT. Yes. Would you be less irrepressible, Mr. Fricano? I am sure that much of that you do out of a desire to inject a little lightness in the proceeding, but——

Mr. FRICANO. I will attempt, Your Honor, to. I don't concede that——

The COURT. In other words, Mr. DeLone prefers you to stay mad and not be the other.

Mr. FRICANO. I think Mr. DeLone would prefer if I were a thousand miles away, Your Honor.

The COURT. I am sure that's not true.

Mr. DELONE. I will say that for myself, but I don't have that option, sir. I am here to try a case and to see that my client gets a fair trial, if I can.

The second thing which he did, when he was apparently making an allusion to a document, GX 250, which was read in evidence yesterday, he examined Mr. Gimlin and said to this effect: "Wouldn't it have been easier for you, Mr. Gimlin, to write down on a note 'Called Atwell,' just as Mr. Weiser did?"

There is no evidence, and that document does not warrant the statement that Mr. Weiser wrote down anything about "called Atwell," and that, I say, is a misstatement of the evidence.

[3454] The COURT. Yes, but you don't think that was done intentionally, surely.

Mr. DELONE. I assure——

The COURT. I don't think that's intentional, now.

Mr. DELONE. I don't know whether it is. I haven't said once that it is intentional.

It is intentional that we all intend to do what we do, just as I intend to argue these to Your Honor now. That's intentional.

I don't say that it is willful, malicious, malevolent, but I do say that it is prejudicial to the Defendants, so much so that

so far as my client is concerned, I ask Your Honor to declare a mistrial on this account.

The COURT. Well, I am not going to declare a mistrial on that account, on that basis.

If you bring these things to my attention as they occur, we will try to correct them. If you wish me to tell the jury now what you have just said, I will tell them that it is for them to decide whether or not there was any testimony that Mr. Atwell wrote that thing on that note or not. I am not going to tell them he did or he didn't, so I don't think he should comment that way.

Mr. DELONE. Frankly, I don't think [3455] there is any way—if I thought there was some way this could be corrected at the time, I would bring it up. I think this kind of thing is uncorrectable, and that is why the only remedy left to me is to move for a mistrial.

Any effort on my part to interject at that point simply exaggerates and blows it up further, and that's the problem that the Defendants necessarily have, if the prosecutor is overzealous.

The COURT. Well, the prosecutor is zealous. I am not going to characterize him as over-zealous, but I would be very unhappy if he weren't zealous. The republic would not be well served if he weren't.

Mr. DELONE. I would be unhappy, too, but I say he is overzealous, sir.

The COURT. All right. I am going to refuse the motion.

• • • • •

[3464] Q. Now, prior to the implementation, or another way of putting it, prior to the effective date of the December 15, 1965 on this price increase there was a meeting, was there not, at Ponte Vedra, Florida in October, 1965, of the Gypsum Association?

A. Yes, sir.

Q. Were you then present with those competitors of yours with whom you had from time to time exchanged prices?

A. Yes, sir.

Q. Did you have any social types of conversations with these competitors as distinguished from the formal meeting in the meeting room?

[3465] A. There would be social conversations. The meetings would take so many hours and there would be dinner and social occasions, golf, that sort of thing.

Q. During these occasions when you were with your competitors at Ponte Vedra, did you talk business?

A. To the best of my recollection, we talked general business conditions, yes, sir.

Q. And did you at this time discuss with your competitors the fact that it was a lousy market for gypsum wallboard?

A. I recall in general we would be discussing housing market, perhaps, general things that affected our business.

Q. Did you discuss with your competitors at this time the fact that prices were low?

A. My general recollection is that we would be discussing all things, including the fact that prices might be low.

Q. Did anyone, to your recollection, at this meeting disagree with the things that were being said?

A. I don't have any specific recollection, no, sir.

Q. Did anyone with whom you had a conversation at this meeting indicate that the industry would be better off if prices were higher?

A. Not to my recollection, no, sir.

Q. Did you discuss, to your recollection, with any [3466] of these competitors, the internal studies which United States Gypsum was then engaged in with respect to the plan that it had for implementing a price increase in December, 1965?

A. Not to my recollection, no, sir.

• • • • •

[3470] Q. • • • Before this meeting and after this meeting, immediately before, I would say about a month before and a month after the meeting, up to November 17, when you announced the December 15 price increase, were you in telephonic contact with your competitors on prices?

A. We would have been in contact on price verifications, yes, sir.

• • • • •

[3506] The COURT. Gentlemen, yesterday, I, in writing, denied the motion of Defendant Watt to strike the testimony of Government witness Simpson concerning the conversation at the first Gypsum Association meeting he attended in October, 1964.

I am rescinding that order to give it further consideration.

Now, what I intend to do is to open this up for argument at an appropriate time. I am very uncertain as to what I ought to do about that, as yet, because it seems to me I have a bill of particulars, and, clearly, the bill of particulars stated, at that first meeting in October, 1964, Mr. Simpson was approached by John Brown of National and invited to participate in the conspiracy.

The testimony, now, was—the testimony was it was Mr. Watt who gave that invitation, which is clearly contrary to the bill of particulars.

The bill of particulars certainly is not affected by whatever is in the Grand Jury testimony. I am not sure you can amend the bill of particulars by an offer of proof, either.

Mr. FRICANO. I would like to be heard on [3507] that at some time, Your Honor.

The COURT. You will be heard on it, but this is what is greatly disturbing me, that—that is why I have resinded the order.

The bill of particulars certainly identifies the person as John Brown, and this was not changed, although there were numerous supplemental bills of particulars—it wasn't changed, and the first inkling of a change came during the offer of proof.

Mr. FRICANO. To which there was no objection.

The COURT. That is true, but I am not sure you can amend the bill of particulars by an offer of proof.

Mr. FRICANO. I don't believe there is a requirement that the bill of particulars list all the evidence, Your Honor.

The COURT. That it what?

Mr. FRICANO. That it requires that the bill of particulars lists all the evidence.

The COURT. I don't, either, but when you do it, it shouldn't be wrong.

Mr. FRICANO. Well——

The COURT. I am not going to argue it now, but we will have argument on it at some later time. [3508] We can do that at some time, right down to the end of the trial.

That is an important matter, as I see it. Certainly, it is important to Mr. Watt, and I want to have ample opportunity to hear fully argument and not while we are waiting for the jury to come in, but hear it fully by both sides, and then reflect on it and reach a decent judgment.

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[3519] • • •

Mr. HIERING. Your Honor, I think that we have got a problem in the sense that the handwriting goes [3520] to explain some of the text of the exhibit, and yet we don't have any identification of the handwriting. So I would object to the entire exhibit.

The COURT. May I see it?

Mr. BARTLIT. Your Honor, I would disassociate myself with that for Mr. Watt. I have no objection.

Mr. HIERING. Your Honor, I think on this particular one—this is true of a number of these—on this particular one I would withdraw my objection.

Mr. FRICANO. Do you mean that Mr. Hiering and Mr. Bartlit have agreed again?

Mr. BARTLIT. I disagree. I don't have any objection to that.

The COURT. And he is withdrawing his.

Mr. HIERING. Yes. I am withdrawing my objection now.

The COURT. All right.

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CROSS EXAMINATION

[3558] • • •

Mr. FRICANO. I have just scanned very briefly Mr. Bartlit's memorandum in support of his motion. I don't know if I want to write a two or three-page reply to it.

The COURT. You can write anything you want.

Mr. FRICANO. I understand that.

The COURT. If you want to do it.

Mr. FRICANO. It might shorten the argument.

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[3575] By Mr. HIERING:

Q. And do you recall that there were changes made from an f.o.b. delivered price basis to a—let me change that.

Do you recall that there were many changes that were made from an f.o.b. plant price basis to a delivered price basis during the years 1962, 1963 and 1964, while you had the job in the Merchandising Department?

A. Yes, sir. I recall that it was a phase program over that period of time.

Q. And that the changes that were made in 1965 were only the last stage in this phase program, is that not correct?

A. Yes, sir.

Q. Now, I would like to turn to your testimony again at page 3328 and read you a question and your answer.

Mr. Fricano asked: "What was USG's purpose in doing this?" Referring to the change to delivered zone pricing, and you answered: "Well, there were a number of purposes. One, the mill base plus freight system was becoming obsolete to a great degree, because it didn't really take into account the trading areas that were expanding in size and scope, so you would have different prices in a mill base plus freight system in a one trade area, depending on the freight rates, and that sort of thing."

[3576] Do you recall that testimony?

A. Yes, sir.

Q. Now, with regard to your testimony that f.o.b. plant pricing was becoming obsolete, you had responsibility for a number of other products when you were in the Merchandising Department of USG, did you not?

A. Yes, sir, I did.

Q. And was it not a fact that a number of these products were on or had been changed to a zone delivered price basis prior to 1965, including such things as building steel products? Do you recall that?

A. Yes, sir.

Q. Do you recall that insulation board was a product that you had responsibility for, was it not?

A. Yes, sir, it was.

Q. And do you recall that insulation board was on a zone delivered price basis?

A. Yes, sir, I do.

Q. Do you recall that hardboard, was that a product that you had responsibility for?

A. Yes, sir.

Q. And was it on a zone delivered price basis?

A. My general recollection is that it was, sir.

• • • • •

[3577] Q. But there were a number of products that you had responsibility for that were sold on a zone delivered price [3578] basis in 1965 and prior thereto, were there not?

A. Yes, sir, there were.

Q. So there wasn't anything peculiar or unusual in your zone delivered price for gypsum wallboard?

A. No, sir.

• • • • •

[3578] • • •

Q. All right. Now, I would like to turn, Mr. Gimlin, to the subject of verification, and I would like to ask you to describe for us the practice of verification with a [3579] competitor of a claim by one of your customers that he had a lower price, and I would like to ask you some specific questions in this regard.

First, you received reports from your sales people from time to time of competitive offers to your customers, did you not?

A. Yes, sir, we did.

Q. And these were frequently reported in writing, were they not?

A. Yes, sir, they were.

Q. And the usual means of reporting was the document called a competitive pricing policy report, is that correct?

A. Yes, sir.

Q. That is the so-called green sheet that you have identified previously?

A. Yes, sir.

Q. Now, many of these green sheets would contain a report from one of your salesmen that a customer claimed he had a lower price from one of your competitors, is that not right?

A. Yes, sir.

Q. Let's assume that you had a bulletin price for half-inch wallboard of $50. The green sheets on some occasions would have stated that a specified competitor had offered the customer a price of $48, would they not?

[3580] A. Yes, sir.

Q. Or it might have stated that the customer had actually bought half-inch wallboard for $48 in some cases?

A. Yes, sir.

Q. Now, in these instances when you got green sheets that reported competitive offers or competitive sales to your customer, in many cases you accepted the report as true, did you not?

A. Yes, sir.

Q. And decided to go ahead and meet the competition?

A. Yes, sir.

Q. Without any communication with a competitor, is that not correct?

A. Yes, sir.

Q. In many cases?

A. Yes, sir.

Q. And this would be the vast majority of the cases, would it not?

A. Yes, sir, it would.

[3581] Mr. BARTLIT. Your Honor, I don't know if Mr. Hiering is going to make a chart from the witness' testimony. If he is, I will object to him doing it for the same reason that I objected to Mr. Fricano doing it. I think it is improper.

Mr. DELONE. I join in Mr. Bartlit's objection.

The COURT. Since I have allowed others to do it, I will allow Mr. Hiering to do it, too.

I think the record should indicate that what counsel is doing is, as the witness is answering questions, writing on an easel board, which is the same as a blackboard.

Mr. HIERING. Your Honor, I will give this an exhibit number and mark it the next exhibit, which is 137.

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Q. Now, Mr. Gimlin, I have marked on this easel on the left column the customer's claim, the lower competitive price that he claimed, whether you believed it or not. And you said in many cases, most cases, you would believe the [3582] report that you had, that a customer claimed that he had a lower price from a competitor; correct?

A. In most cases my general recollection is that we would believe them.

Q. You would believe it. Met that competition. In those cases you did not verify; is that correct?

A. That is correct.

Q. Now, in some cases, you believed the customer's claim that he had a lower price, but you just simply decided—for whatever reason—that you did not want to meet it; is that not correct?

A. There would be, from my general recollection, some instances of that type, yes, sir.

Q. And in those cases you did not verify; did you?

A. No, sir.

Q. All right.

Now, in some cases, you simply did not believe the customer's claim and you refused to meet the competition; is that not correct?

A. Would you repeat that again, sir?

Q. Well, there would be some cases where you would look at the green sheet?

A. Yes, sir.

Q. And decide that the customer simply was not telling the truth, and toss it aside and not meet the [3583] competition; is that not correct?

A. That's correct, sir.

Q. And not verify with the competitor?

A. Yes, sir. That's correct.

Q. Now, there would be some cases where you would get a green sheet and you would not know whether the customer was telling the truth or not; is that not correct?

A. Yes, sir.

Q. You would have doubts about the truthfulness of the claim that the customer had made?

A. Yes, sir.

Q. All right.

Now, in some of those cases, you decided that you had no interest in meeting the competition—did you not—regardless of whether the claim was true or not?

A. Yes, sir.

Q. And in those cases you did not verify with the competitor; did you?

A. No, sir.

Q. I will mark that "Don't know," "Not met," "Not verified."

Now, there are cases where you had a green sheet and again you doubted the truthfulness of the claim of the customer, where you would send the green sheet back to a sales manager, district manager, area manager—some-[3584]one else—and ask him to check it out in the market to find out if there are other lower prices at the same level; would you not? To verify it internally, in other words; is that not correct?

A. We would send some of them back, that's correct, sir.

Q. You would do this in some instances where you had doubt about whether or not this was a solid truthful report?

A. Yes, sir.

Q. And in some of those instances you would verify internally, but not check with the competitor; is that not correct? In some you would and some you wouldn't but there are some where you did not; is that correct?

A. Yes, sir, to the best of my recollection.

Q. All right.

I will mark this "Don't know." "Verified internally." "Not verified with a competitor."

Now, there were some cases again where you had a green sheet where you had doubt about the truthfulness of the claim by the customer, and where you would verify it with the competitor; is that not correct?

A. That's correct, sir.

Q. I will mark that "Don't know." And you did verify with the competitor.

[3585] Now, with regard to your testimony on the frequency of these verification calls to your competitors, putting this in the context of the total transactions of the company—First of all, there are many, many transactions that are not on this chart at all—are there not—where you didn't get a green sheet, you simply sold the product at your bulletin price?

A. Yes, sir.

Q. All this chart depicts are the instances where you did get a green sheet.

Now, in the cases where you got a green sheet, where you had a claim by the customer and where this was brought to your attention, the category No. 1 where you believed the customer and met the price, accounted for by far the vast majority; did it not?

A. I have a general recollection that this was our procedure. But when it comes to sifting out details, it is difficult due to the period of time.

Q. I am not trying to get numbers on this, but just merely the fact that there were many, many instances where you got a report on a lower competitive price and the company decided to meet it without verifying it; is that not correct?

A. That would be correct, sir.

[3586] Q. All right. Now, going to the category number 66, the only category there where you did verify with the competitor in relation to the total transactions of the company, the total number of sales, and the total reports of competition you had, that would be a relatively small percentage of the grand total; would it not?

A. Of the total transactions of the company; yes, sir.

Q. Of the total transactions; yes. Now, in those cases where you did verify with a competitor, you called the competitor and said in substance, did you not—well, for example: "Your bulletin price was $50. I have a report that you have offered the XYZ wallboard dealer one-half-inch wallboard at $48."

Is that not correct?

A. Yes, sir.

Q. And the competitor would answer yes or no?

A. Yes, sir.

Q. Now, if the competitor answered no, you did not meet the price, did you?

A. If he ansewred no; no, sir.

Q. You did not meet the price?

A. No, sir.

Q. And if he answered yes, what did you do?

A. We would meet the price, generally speaking, to the best of my recollection.

[3587] Q. You made your own decision, whether you would or would not meet the price. You didn't meet it in every instance, did you?

A. I have no recollection as to the specifics in that regard, but we would make a decision after we—after we verified it.

Q. Now, I would like to turn, Mr. Gimlin, to the purpose of USG in engaging in the practice of price verification, and I will read to you from yesterday's transcript at page 3343.

Mr. Fricano asked, "What was the purpose of United States Gypsum engaging in this practice, this understanding of exchanging this kind of information we have been talking about?"

And you answered: "So we wouldn't be over-competitive on price."

Do you recall that?

A. Yes, sir.

Q. Now, I would like to ask you, Mr. Gimlin, why you did not want to be over-competitive, and specifically ask you if it is not a fact that one of the reasons that you did not want to be

over-competitive was so that you could be in compliance with the Robinson-Patman Act.

A. Yes, sir.

Q. You were told by counsel, were you not, on many, [3588] many occasions, that it would be illegal, under the Robinson-Patman Act, generally speaking, to sell at a lower price to a customer, unless you were meeting in good faith the lower price of a competitor. Is that not correct?

A. Yes, sir. That would be correct.

Q. So, in those instances that we have on the chalk board, number 4, number 5, number 6, if you had a substantial doubt about the truthfulness of the claim from the customer, that he, in fact, had a lower price from a competitor, had you not been advised by counsel that it would have been illegal for you, under the Robinson-Patman Act, to meet that lower price?

A. Yes, sir.

Q. And, in fact, when you did have such a doubt, you did not meet that low price? Is that not correct?

A. Yes, sir.

Q. So the practice of verifying with a competitor in some cases, when he said he did not—did not have the lower price, that didn't change anything: did it?

A. No, sir.

Q. Where the competitor said, "Yes, I do have a lower price," that enabled you to meet that price that you would not have been able to meet in the absence of the verification call; is that not correct?

A. Yes, sir.

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[3589] Q. When you got a negative response from your competitor, when you called him, and he said, "No, the report is not true," then you did not meet the claimed lower price; did you?

A. No, sir.

Q. And you did not do that, at least in part, because you had been advised by counsel that it would be illegal to [3590] do it under the Robinson-Patman Act; is that not correct?

A. Yes, sir. That is correct.

Q. Now, if you had not verified with the competitor and if it were a situation where you had a substantial doubt about the truthfulness of the report, such as in cases 4, 5, and 6 on the

chalk board, you doubted the truthfulness of the claim, then were you not advised by counsel that it would be improper to meet the lower price under the Robinson-Patman Act?

A. Yes.

Q. And you did not meet it in those cases, did you?

A. No, sir.

Q. So that, if you got a negative response from your competitor when you called him, that didn't change anything as far as what you did; did it?

A. No, sir.

Q. If you got an affirmative response from the competitor when you called him, and he said, "Yes, the report is true, I am selling this customer at $48," then, that enabled you to make a decision whether you would or would not meet that price. Is that not correct?

A. Yes, sir.

[3591] By Mr. HIERING:

Q. And in many cases you did meet when you got such a response, did you not?

A. To the best of my recollection, generally we did.

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Q. So that when you got a negative response from the competitor, he said that the claim was untrue and you did not meet that lower price, to the extent that this had a stabilizing effect on prices, was this not due to the fact that you were following the directions of your counsel with regard to compliance with the Robinson-Patman Act?

A. Yes, sir.

[3592] Q. Now I would like to turn, Mr. Gimlin, to some further questions about verification and the nature of verification calls.

When you made a verification call, is it not a fact that you made this call to get information on which you could base your independent decision to meet or not to meet the claimed lower price?

A. Yes, sir.

Q. Is it not also a fact that when you made these calls you asked your competitor whether the claim made by the customer was true with respect to the price at which he had sold

or was selling or had offered or was offering the product? Is that not correct?

A. Yes, sir.

Q. You did not ask him, did you, whether he was going to continue to sell at this price?

A. No, sir.

Q. And you didn't ask him whether he intended to increase the price?

A. No, sir.

Q. And you didn't ask him whether he intended to decrease the price?

A. No, sir.

Q. And you didn't ask him anything else about what he intended to do or would do in the future?

[3593] A. No, sir.

Q. Nor did you tell him what you intended to do?

A. No, sir.

Q. Or what you would do?

A. No, sir.

Q. By way of summary, when you made these calls you wanted information that you could use to make your own independent decision, is that not correct?

A. Yes, sir.

Q. But you did not discuss this decision, or anything else with what you or your competitors would do in the future, is this not correct?

A. That is correct, sir.

Q. Now turn to the question of job price protection and the verification of job price protection. First I would like to ask you—well, let me back up just a minute.

There were a number of instances I believe you testified to where your competitor did not answer you when you made a request, is that not correct?

A. Yes, sir, there were instances where he didn't answer.

Q. And there were some instances where you did not answer?

A. Yes, sir.

Q. Such as Wicke's example that you gave us yesterday?

[3594] A. Yes, sir.

Q. Now turning to job price protection, typically job price protection involved a large job, did it not?

A. Yes, sir.

Q. And the reason for this would be that it was a job that involved quite a period of time between the commitment made by the contractor on his bid and the time when the wallboard would actually be installed, is that not correct?

A. Yes, sir.

Q. And an example of this kind of a large job might be the United States Steel Building across the street?

A. Yes, sir.

Q. In that kind of a building there would be a time lag of sometimes more than a year, would there not, between the time the contract was signed up by the drywall contractor and the time the wallboard was actually purchased for the job, would there not?

A. Yes, sir.

Q. So the contractor was concerned he was bidding and committing himself to a firm bid and wanted to have a firm commitment that he would be able to buy the wallboard for the job at the current price at the time of his bid, is that not correct?

A. Yes, sir.

Q. This was the basic reason for price protection?

[3595] A. Yes, sir.

Q. So that typically the price protection commitment would precede by some time any announcement of a price increase, is that not correct?

A. Typically, yes, sir.

Q. It could be in closer proximity, but normally it would be long before a price increase?

A. The commitment wouldn't have any particular relativity as to when a price increase might or might not be made, as far as I was concerned.

Q. The consideration of the contractor was to get a price to protect him against a future price increase that may or may not occur, is that correct?

A. Yes, sir, that would be correct.

Q. Now I would like to read from you from the record from the day before yesterday at pages 3230 and 3231.

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[3596] Mr. HIERING:

Question: All right, sir. Now, I am directing myself, now, to a specific time period. Did you, from time to

time, between the time of announcement on a price increase and the effective date of that price increase, have conversations with your competitors concerning whether or not they were going to grant price protection in connection with the price—effective date of the price [3597] increase that was coming?

Answer. I can only give you a general recollection that we would have verified, during that period of time, if we had a competitive situation that was drawn to our attention.

[3598] Q. Mr. Gimlin, is it not a fact that what you verified with respect to job price protection was whether or not your competitor had made a commitment to grant price protection and not whether he was going to make such a commitment in the future?

A. Yes, sir.

Q. Now, when you were in the merchandising department of USG, from 1962 through the end of 1965, I believe you have already testified you had responsibility for a number of other products. Is that not correct?

A. Yes, sir.

Q. And, in connection with these other products, you had competitors; did you not?

A. Yes, sir.

Q. You were not the only company in any of these businesses. There were a number of other companies that were competing with you on this whole line of products; is that not correct?

A. Yes, sir.

Q. And you received reports, from time to time, of competitive prices on these other products; did you not?

A. Yes, sir.

Q. And were these reports in the form of competitive pricing policy reports, the so-called green sheet?

A. Yes, sir.

[3599] Q. At least, many of them were?

A. Yes, sir.

Q. You used the same forms for these other products as you used for gypsum board products; is that not correct?

A. Yes, sir.

Q. And is it not also correct that you verified a claim of a lower price with your competitors, from time to time, on these other products?

A. Yes, sir.

Q. And your competitors verified with you on these other products with respect to lower prices; is that not correct?

A. Yes, sir.

Q. Would your testimony about verification, that you have given here, apply to all these other products?

A. Yes, sir.

Q. There wasn't anything different that you were doing, as far as the practice of verification with regard to gypsum board products, than the practices that you had with respect to other products of the company; is that not correct?

A. No, sir.

Q. Just to make that clear, your practice with respect to other products, as far as verification is concerned, was the same as it was for gypsum board products?

[3600] A. We had the same policies, same practices, for all the products.

Q. Is it the case that some of these products were more competitive than gypsum board products?

A. Oh, it is a relative thing. Back a number of years, all the products were competitive. I have no recollection as to which ones were more or less competitive.

Q. You don't have any recollection that there was a great difference in these other products and gypsum wallboard, in that regard?

A. No direct recollection.

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Q. And there was nothing peculiar about gypsum board as far as price verification or any of your other pricing practices was there?

A. Not that I can recall, sir.

Q. Now, I would like to read you, Mr. Gimlin, from [3601] the transcript of your testimony of the day before yesterday, at page 3222.

Question. While you were director of merchandising and vice president of merchandising, which I believe was from 1962 until the time you resigned, did you have an understanding with the other major producers of gypsum wallboard whereby you would exchange with one another competitive pricing information and other matters relating to competition?

Answer. We exchanged competitive information.

Question. Is the answer to my question "yes" with that explanation?

Answer. Yes, sir.

Now, I would like to ask you, Mr. Gimlin, was this so-called understanding that you referred to anything more than the fact that you answered your competitors' vertification questions, and you hoped that you would get an answer from them when you asked similar questions?

A. No, sir. That would be my recollection as to what was meant.

Q. And, sometimes, you did not get an answer on some occasions. Is that not correct?

A. Yes, sir.

Q. And, sometimes, you would not give an answer? [3602]

A. Yes, sir.

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[3606] • • •

Q. And you had a meeting in connection—I think you said—with the sale of tile to Georgia-Pacific?

A. Yes, sir.

Q. At some point you bumped into—As I recall your testimony you met Mr. John Brown at the airport?

A. Yes, sir.

Q. Is that before or after you had had your meeting with Mr. Hunt and Mr. Lane about the sale of tile?

A. To my best recollection it was before.

Mr. MELLOTT. Well, if the Court please, I do not believe the testimony supports the fact that he had a meeting with Mr. Hunt and Mr. Lane before . . .

The COURT. The witness answered the question.

Mr. DELONE. If I have misstated the testimony, it is unwitting. I am trying to call the attention——

Mr. FRICANO. If Mr. Mellott wants to help Mr. DeLone, I think he ought to do it some other way.

[3607] Mr. DELONE. I object to that comment. I am not asking for any help from Mr. Mellott or from you, Mr. Fricano.

Mr. FRICANO. You won't get any help from me, Mr. DeLone.

Mr. MELLOTT. I will cover it in my cross-examination, Your Honor.

The COURT. All right. I think that's a better way to do it than making statements.

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[3610] Mr. MELLOTT. Yes, I have a question.

By Mr. MELLOTT:

Q. Mr. Gimlin, referring to this same meeting that Mr. DeLone was just referring to—incidentally, my name is Cloyd Mellott. I represent Georgia-Pacific.

A. How do you do, sir. Sir?

Q. Am I correct that it is your recollection that that meeting occurred on February 16, 1965?

Mr. DELONE. I object to the form of that question, unless it specifies which meeting, if you are talking about dinner with Mr. Brown or if you are talking about some other meeting. He has testified to an earlier meeting with Georgia-Pacific people.

Mr. FRICANO. The same thing has just happened.

Mr. MELLOTT. Well, let me clarify the question.

Mr. DELONE. I don't understand what Mr. Fricano means.

Mr. FRICANO. I can make it more specific.

Mr. DELONE. And I ask he be instructed not to make such comments.

Mr. FRICANO. I object to counsel——

The COURT. He is inferring you suggested to Mr. Mellott what kind of a question he may ask.

[3611] Mr. MELLOTT. If the Court please, I object to that inference.

The COURT. Was that your basis?

Mr. FRICANO. That was exactly the basis.

Mr. DeLone. I ask that Mr. Fricano make an objection and Your Honor rule on it. I believe my objection was proper, and the question was quite ambiguous. There have been two meetings discussed, and I think I am entitled to know.

The Court. I think you are, too, but the only thing—it would be better if you didn't suggest what the alternatives are, but ask him to rephrase his question to identify the specific meeting, and then we wouldn't have any problems.

By Mr. Mellott:

Q. Mr. Gimlin, on the occasion——

Mr. DeLone. I take it Your Honor will not instruct Mr. Fricano to direct the objections to the Court.

The Court. He is supposed to, certainly, direct his objections to the Court.

Mr. DeLone. He didn't make an objection. He made a comment, and he does it frequently, and I don't think it is appropriate.

[3612] The Court. This was an implied objection; but, in the future, will you say, "I object"?

Mr. Fricano. I certainly will, Your Honor.

The Court. All right.

* * * * *

[3629] Q. Well, let me ask it this way: Let me go to this subject, Mr. Gimlin: You testified, I believe under examination by Mr. Hiering, that verification with competitors enabled you to meet competitive prices that you might not have been able to othewise lawfully meet. Do you recall that?

A. Yes, sir.

Q. So it is a fact, isn't it, that verifying, so far as you were concerned, these verification calls with competitors allowed you, in certain circumstances, to legally grant new, additional discounts in the market for U. S. G.?

Mr. Fricano. Objection, Your Honor, calls for a legal conclusion.

Mr. Bartlit. I said so as this witness' knowledge of the time. His state of mind is very important, Your Honor.

Mr. Fricano. I renew my objection.

The Court. All right. I am going to allow the question to be asked, but, please, remember, ladies and gentlemen of the jury, this man is not a lawyer, and his definition of what is legal and what isn't legal [3630] isn't governing.

I will charge you as to these matters ultimately and also the fact that somebody got legal advice doesn't necessarily mean that the legal advice was a correct statement of the law, and I will attempt to tell you what the law is on the matter when it comes time for you to deliberate.

Go ahead.

Mr. Bartlit. Madam reporter, would you read the question, please.

[Question read.]

The Witness. Yes, sir.

* * * * *

[3635] Q. So, isn't it a fact then that the only kinds of discounts that were limited or reduced or eliminated in any price vertification were those that were based on fraud or lies, or mistakes, in perhaps some cases?

A. Yes, sir.

* * * * *

[3637] Q. From your experience, Mr. Gimlin, were there instances where customers—I won't use the word "lie." Weren't there instances where customers made statements about competitive quotes that were not accurate?

A. Yes, sir.

Q. And if your verification established that to be the fact, then you would not extend a discount; would you?

A. Yes, sir.

Q. Yes, you would not?

A. Well, the way you asked it. We would not extend the discount, sir.

* * * * *

[3639] Q. Now, I'd like to take a look at the actual facts in the marketplace and ask you two or three questions.

It is a fact—isn't it—that in 1965 prices were deteriorating quite badly throughout the year?

A. Yes, sir.

Q. And it is a fact—isn't it—that in 1962 prices were much more stable?

A. Yes, sir.

Q. And isn't it a fact that you testified yesterday—and the fact is—that verification calls were much more frequent in 1965 than they were in 1962?

A. Yes, sir.

Q. So isn't it true, as a matter of fact, in the marketplace that prices were deteriorating much more rapidly when verification calls were higher than back in 1962 when [3640] there were a lower number of calls?

• • • • •

The WITNESS. I'd have to answer "yes" to that.

By Mr. BARTLIT:

Q. Isn't that because as far as you were concerned verifying allowed you to legally grant additional new discounts in the marketplace?

Mr. FRICANO. Objection.

The COURT. Well, with the caution that I have made he can tell you what he thought, but that doesn't make it so.

Mr. BARTLIT. Would you want the question read back?

The WITNESS. Please.

[Last question read.]

The WITNESS. My answer to this would be [3641] "Yes, sir."

By Mr. BARTLIT:

Q. And the more verification calls that were made, that were sustained, the more additional discounts in your state of mind you could legally grant; right?

A. Yes, sir.

Mr. BARTLIT. No more questions, Your Honor.

The COURT. You see, ladies and gentlemen, eventually you are going to have to decide whether this was a legal thing to comply with the Robinson-Patman Act, or whether you are going to have to decide on the contrary, that although it was called that, it was really for some other purpose. You, the jury, is going to have to make that kind of a decision under the appropriate charge.

• • • • •

By Mr. FRICANO:

• • • • •

[3644] • • •

Q. Okay. Now, can you classify or characterize the type of customer that you discussed over the telephone with your competitors? Was he a little guy, a middle-of-the-road guy, or a big guy?

A. To the best of my recollection, sir, he could be any kind.

Q. Well, did one predominate over the others?

[3645] A. As far as verification?

Q. Yes, sir, these customers that you had.

A. I have no direct recollection.

Q. Oh, come on—excuse me. I withdraw that.

Mr. Gimlin, is it not the fact that in—a greater percentage of the conversations that you had with your competitors on these matters were regarding the larger customers in the marketplace?

A. I could not testify to a direct recollection to that case.

Q. What is your best recollection?

A. I would like to go on. I guess it is all right for me to express an opinion.

The COURT. Go ahead.

Mr. FRICANO. Sure.

Mr. BARTLIT. Your Honor, I would object to an opinion. He can testify to a recollection or direct recollection, but if he is guessing or speculating—

The COURT. I don't want him to guess, but let's hear what he has to say, and then we can pass on it.

• • • • •

[3647] Q. Were those telephone calls which you made to your competitors important?

A. Were they important?

Q. Yes, sir.

A. Yes, sir.

Q. Or you wouldn't have done it, would you?

A. That's right, sir.

Q. Were they important to you from a business standpoint?

A. Yes, sir.

Q. Did they help the profit picture of United States Gypsum?

A. Did they help the profit picture? Yes, sir.

• • • • •

[3652] Q. Now, Mr. Gimlin, do you know how many percentage points——

A. Yes, sir.

Q. [Continuing]—Can you approximate from a percentage standpoint how many sales United States Gypsum actually made at its bulletin prices?

A. No, sir.

Q. You have no idea?

A. No, sir.

Q. You——

A. You mean the totals?

Q. From the universe of 100 per cent. Let's take the year 1962. You already testified there was reasonable stability in 1962, didn't you?

A. Yes, sir.

Q. In the year 1962, what percentage of the United States Gypsum's sales were at bulletin prices, the published price?

A. I would have to say in a general way my best recollection would be a high percentage.

Q. How about 1965?

A. It would be a lower percentage or a low percentage.

Q. Well, it is a relative term, but we are equating [3653] one versus the other. It would be a much higher percentage at bulletin prices in 1962 and a much lower percentage of them at bulletin prices in 1965.

Q. Now, Mr. Bartlit asked you a question about 1962 and the degree of conversations on prices that you had with your competitors.

A. Yes, sir.

Q. Did they help the profit picture of United States Gypsum?

Q. And you said there wasn't as many that year. Do you recall that?

A. Yes, sir.

Q. And then he asked you the question about 1965.

A. Yes, sir.

Q. And I believe you testified that there were more conversations——

A. Yes, sir.

Q. [Continuing.] In that time period.

A. Right, sir.

• • • • •

Q. More calls in 1965, correct?

[3654] A. Yes, sir.

Q. And there were more calls in 1965 because there was more competition in 1965, correct?

A. Yes, sir.

Q. If you had not been exchanging pricing and other information with your competitors in 1965, would prices have gone down faster, slower or the same rate?

A. I would say in my judgment they probably would have gone down faster.

Q. If you had not been?

A. If we had not been exchanging information.

Q. So if we are drawing a curve of sorts, instead of going like this [indicating], it would slope?

A. Yes, sir.

Q. Is that what you meant when you testified, sir, because of these telephone calls some market stability in pricing occurred?

A. Yes, sir.

Q. And this was pursuant to your understanding with your competitors, correct?

Mr. HIERING. Object to that, Your Honor.

The COURT. Overruled.

By Mr. FRICANO:

Q. Understanding to exchange these prices?

The WITNESS. You better tell me what kind [3655] of understanding.

Mr. FRICANO. Read my previous question back, please, Mrs. Wike?

[Previous question read.]

Mr. WARNKE. May I state my objection? I think that this is totally unclear. What does this mean?

The COURT. I am interpreting this to mean the resulting stability in prices.

Mr. FRICANO. That is exactly what I meant.

The WITNESS. Could I have what understanding means?

By Mr. FRICANO:

Q. The mutual understanding you had with your competitors, if you call him, or if he calls you, that you would exchange this stuff.

Mr. HIERING. That is another question.

The COURT. He wanted to know what was meant by understanding. That is not the question.

The WITNESS. But the understanding relates to verification, as I understand the use of the word understanding.

Mr. FRICANO. Yes, sir.

The COURT. No, it related to stability.

The WITNESS. The only thing I drew from [3656] the question, it was an understanding as to stability if what we are talking about is an understanding as to verification.

By Mr. FRICANO:

Q. And the effect of that.

A. And the effect of that ended up with more stability.

• • • • •

[3658] Q. Mr. Gimlin, did you also follow the printed policy of United States Gypsum Company to only obtain the information that you got from your competitors only in the field?

Mr. BARTLIT. Objection, Your Honor. He testified he never saw that piece of paper the first day of his testimony.

Mr. FRICANO. What possible difference does that make? The document is in evidence.

The COURT. None.

Go ahead.

By Mr. FRICANO:

Q. You saw that document yesterday, didn't you?

Mr. HIERING. Objected to as a misstatement of the record, Your Honor.

The COURT. In what regard, Mr. Hiering?

Mr. HIERING. In regard this was not a document that was directed at this man. It was directed at salesmen.

The COURT. That is not the question. He wants to know having seen the document in court, was that his policy as well.

Mr. FRICANO. May the witness have 22, please?

By Mr. FRICANO.

[3659] Q. Do you have that document in front of you, sir?

A. Yes, sir, I do.

Q. That document is entitled "Legal Aspects Of Selling, is it not?"

A. Yes, sir, it is.

Q. And it runs for something like 13 pages, does it not?

A. Yes, sir.

Q. More than this four-page exhibit prepared by Mr. Morgan and others?

A. Yes, sir.

Q. And it is much more comprehensive, is it not?

A. Yes, sir.

Q. And it has full discussion beginning at page——

The COURT. Now wait.

Do you know what is in it?

The WITNESS. I am just assuming——

The COURT. Have you ever read it?

The WITNESS. No, sir, I have not read it.

The COURT. We are not going through the 13-page memorandum and ask him——

Mr. FRICANO. I have no intention of doing that, Your Honor. I will just read a heading and a sentence, Your Honor.

Mr. HIERING. From what page?

[3660] Mr. FRICANO. I have to find it.

Page 12-9, according to this. Roman XII-9 there is a heading that says "The Clayton Act."

It goes on to describe the Clayton Act and at the next page it says, "Price Discrimination."

The sentence is, "This is Section 2-A of the Clayton Act as it was amended in 1936 in the Robinson-Patman Amendment."

Mr. HIERING. I object to this as repetition. This whole thing was read to the jury.

The COURT. He wants to ask this witness something about it, Mr. Hiering.

By Mr. FRICANO:

Q. Under that heading, "Price Discrimination," Robinson-Patman Amendment, you go one whole page and over to the next page and there is a discussion what you can do and what you can't do. Doesn't the sentence under this section—there is a sentence, "Thus, it is permissible for the company to meet competitive situations as to price, policy, service, terms and conditions of sale either wholly or in part, the facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade."

Did you comply with that printed policy of United States Gypsum, Mr. Gimlin?

A. Did I comply with it?

[3661] Q. Yes, sir.

Mr. HIERING. I object to that as being described as a printed policy of United States Gypsum. It is a document directed at salesmen, not at this witness.

The COURT. He wants to know from this witness whether that is what he did or not. That is all.

The WITNESS. No, sir.

By Mr. FRICANO:

Q. You did not comply with that?

A. No, sir, I have never seen it before. That has been established. But you want to know if my actions complied with that sentence?

Q. That is right.

A. No, sir.

Q. Because, in fact, you got this information not from the trade, but from the people against whom you were allegedly competing, correct?

Mr. HIERING. I object to that as a misstatement of the record again.

Mr. BARTLIT. I request Mr. Fricano read the bottom two paragraphs on page 113.

The COURT. I am going to stop this entire interrogation as to that document and ask the jury to disregard it. This witness has not seen that document. It has some 13 pages and this is not

time, while he is sitting [3662] on the witness stand, to ask him to read it and interpret it.

Mr. FRICANO. I don't want to.

The COURT. We are not going into that document any further.

By Mr. FRICANO:

Q. Your green sheets, Mr. Gimlin, they were designed, were they not, to get this competitive information from the field up into the main office, correct?

A. Excuse me. Yes, sir.

Q. And they reflected your records on what you actually did with respect to a given situation, with respect to a given customer, do they not?

A. Yes, sir.

Q. So if you meet the competition allegedly reported in the green sheet, there would be an attachment saying we are going to meet this competition, correct?

A. To my best recollection you just checked in certain boxes on the form. I don't remember any attachment.

Q. That was the effect of the green sheet itself, was it not?

A. To put something in motion, if you approved it?

Q. Yes.

A. Yes.

Q. And if you disapproved it, it also showed?

A. Yes.

[3663] Mr. DELONE. Objection.

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• • •

Q. All right.

Do you recall whether or not these lawyers who told you about your responsibilities under the Robinson-Patman Act also told you to keep notes so they would have a record of what you were doing?

A. Are you asking me did they tell me to keep notes?

Q. Yes, sir.

A. No, sir, I don't remember any instructions to keep notes.

Q. Did Mr. Watt tell you to keep any notes?

A. No, sir, not to my recollection.

[3667] Q. Does he have a better memory than you do?

A. I don't know, sir.

The COURT. He can't answer whether Mr. Watt has a better memory than he does.

Q. Continuing with your Robinson-Patman Act compliance, Mr. Gimlin, if you were so all-fired hot to comply with the Robinson-Patman Act——

Mr. BARTLIT. Your Honor.

Mr. HIERING. Your Honor, object to that type of question.

Mr. BARTLIT. Mr. Fricano admitted he is emotional, and I suppose that he is entitled to some latitude, but the Court has repeatedly instructed counsel to be courteous to the witness, and this is intimidating, threatening.

The COURT. Don't use the "all-fired."

By. Mr. FRICANO:

Q. Mr. Gimlin.——

A. Yes, sir.

Q.——did I intimidate you?

A. Just then?

Q. Yes, did I intimidate you, Mr. Gimlin?

A. No, you didn't intimidate me.

Q. Have I ever intimidated you, sir?

[3668] A. No, sir. It just gets uncomfortable.

The COURT. Now, gentlemen, along with comments, I would hope everybody would control their outward expressions of mirth, joy or dissatisfaction. Those are about the same as comments, and I think we can do without either one.

Mr. FRICANO. Thank you, Your Honor.

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[3670] Q. Now, when you put the fictitious price as distinguished from the actual price on the invoice, if a competing dealer was not getting that discount also, if he got his hands on that invoice in some way, he wouldn't know that he wasn't getting a discount, would he?

Mr. HIERING. Object to that as a misstatement of the record, Your Honor.

The COURT. You can answer the question.

The WITNESS. No matter who saw the invoice, they would not—I mean, it would not be the right price.

By Mr. FRICANO:

Q. Where is the good faith in all that, Mr. Gimlin?

Mr. DELONE. Object.

The COURT. All right. Sustained.

By Mr. FRICANO:

Q. Yet, while a competing dealer wouldn't know that was a fictitious price, if your competitor called, you would tell him, wouldn't you?

Mr. HIERING. Object to this reference to "fictitious price" Your Honor. There is nothing in the [3671] testimony of this nature to that effect.

The COURT. Well, I think everybody knows what he means by using that term "fictitious price." A price that wasn't the actual price that was charged.

Mr. DELONE. I object to the pending question as being argumentative.

The COURT. You can answer it.

The WITNESS. Better read it to me again.

[Question read.]

The WITNESS. If the competitor called to verify the price, we would verify the situation.

The COURT. All right. Now, we have gone into that quite frequently, and that's the end of it.

Mr. FRICANO. Can I ask just one last question, just one?

The COURT. I will hear the question and then I will decide it.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Did the lawyers who told you to comply with the Robinson-Patman Act also tell you not to tell the truth in the invoices?

A. I have no recollection that they told us not to tell the truth——

The COURT. All right. Now, that's it.

[3672] The WITNESS.——by the invoice.

The COURT. That's the question and that's the answer.

By Mr. FRICANO:

Q. Now, Mr. Hiering asked you a question on job price protection and he said in his question that when you talked to your competitors, between the time of a price announcement and the effective date concerning job price protection, he asked you

the question: Was that with respect to a competitive situation that had been granted, reportedly been granted; do you recall that?

A. Yes, sir.

Q. Was it also the situation in these telephone calls between the announcement date and the effective date that the report was that competition was offering job price protection?

A. I equate the same, offer or having committed.

Q. Now, you testified that you were also exchanging pricing and other information on all your other products, is that right?

A. That the same policy applied to all products, yes, sir.

Q. Did the same policy of getting this information in the trade also apply to those other products?

A. Getting the information from the field?

[3673] Q. Yes.

A. Yes, sir.

Q. Yet even with respect to those products, you violated the company policy as depicted in GX No. 22?

Mr. DeLone. Objection.

Mr. Hiering. Objection, Your Honor.

The Court. That is that long policy that I said we weren't going into any more, yes. Sustained.

By Mr. Fricano:

Q. Does it make it any better, one way or another, that you were not only doing it with respect to gypsum wallboard, but all your other products?

Mr. McSweeney. Objection, Your Honor.

Mr. Hiering. Oh, objection, Your Honor.

The Court. Sustained. I am sustaining the objections as to the things I think you should argue to the jury instead of asking the witness, you see.

Mr. Fricano. Well, I appreciate that, Your Honor, but the indictment in this case charges a conspiracy in gypsum wallboard only. It doesn't charge a conspiracy on these other products.

The Court. Why did you ask him about the other products?

Mr. Fricano. I don't know why Mr. Hiering asked him.

[3674] The Court. Nobody objected to it either, so let's go.

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[3716] • • •

Mr. Keck. Your Honor, may I make a motion before the jury comes back.

The Court. All right.

Mr. Keck. Regarding prejudicial prosecutorial tactics which I feel must be brought to your attention.

The Court. Can't we do that at 4:30? The jury has been sitting out there.

Mr. Keck. I can do it now, if Your Honor wishes. With respect to the testimony that has gone on——

The Court. Make it short if you can. I did ask the jury to come down at two o'clock after telling them we would be late from 1:30. So I would like to get them in here.

But go ahead.

[3717] Mr. Keck. Yes, sir.

Mr. Fricano this morning repeatedly charged the witness, Gimlin, over objection of defense counsel with violating United States Gypsum's policy regarding compliance with the Robinson-Patman Act by reference to the statement in Government Exhibit 22, and I quote, "The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade."

Over objection, Mr. Fricano eventually succeeded in forcing the witness to respond that he did not comply with that policy.

The Court. Didn't I order that all disregarded by the jury and say it was improper?

Mr. Keck. I don't recall that, and I don't believe you did because he made some statements this morning that were completely at odds with the facts he had brought out from his witness the day before, and I think that this was calculatedly done to prejudice my client. And I think——

The Court. Reprehensible tactics.

I think the record will indicate, Mr. Keck, that that document that this man had never seen, the 13-page document——

Mr. Keck. Yes, sir.

The Court. ——and I think the record [3718] will indicate that I said I wasn't going to allow him to be asked to study that document on the witness stand and answer questions concerning it, and I think the record will also indicate, as I told the jury, to totally disregard that.

Mr. KECK. May I read this for the record then, and renew this tomorrow morning if I think it is——

The COURT. I think you will find that is what I did. Now, I don't know what else you want me to do.

Mr. KECK. What I want you to do is to—I want you to grant a motion for a mistrial because of this unfair conduct.

The COURT. All right. That motion will be denied.

Mr. KECK. Well, I would like to complete my record.

The COURT. Go ahead. But I think—don't you think you ought to wait to look at the record and see whether you are right?

Mr. KECK. Your Honor, the fact that you cut off the investigation does not remove——

The COURT. Interrogation.

Mr. KECK. ——the prior statements this man made.

The COURT. Go ahead and put it on the [3719] record.

Mr. KECK. ——which I do object to.

The COURT. You put it on the record.

Mr. KECK. This line of discussion constitutes an inexcusable breach of the prosecutor's obligation to not misstate the record and facts and not to make charges and to not ask questions based on factual assumptions that are positively and directly contradicted by the record that are highly prejudicial to the Defendant I represent.

Mr. Gimlin had testified in answer to Mr. Fricano's questions the day before that he had never seen this exhibit. The Government witness who had testified concerning it was Mr. Bear who testified that it was a written treatise on the legal aspects of selling. And it was distributed only to the field sales organization and not to people such as Mr. Gimlin back at the headquarters office.

Now, this exhibit was clear on its face that it pertained to legal advice only, that it applied only to salesmen and to the field selling organization itself. Indeed, on its face it stated, and in language inexplicably clear, that this memorandum is stated in general terms. It is intended to be instructive and informational, and yet suddenly it becomes a policy in the questions of the prosecutor this morning.

[3720] Mr. Gimlin was never a salesman in the field selling organization of United States Gypsum as shown by the stipulation we entered into in good faith with the Government. It was clearly improper for the prosecutor to suggest by his questions and the witness's answers that a memorandum of legal advice was a policy, and that as such, a policy which the record showed never applied to Mr. Gimlin and was not followed by him. He forced that out of him. The prosecutor over objection pointedly ignored the only testimony on record at this point of time by the Government witness. This was an unfair and improper examination. And on behalf of my clients we respectfully move for a mistrial on the grounds of prosecutorial misconduct.

The COURT. The motion will be denied.

• • • • •

[3721] K. A. McCASKILL resumed the stand, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. FRICANO:

• • • • •

[3722] Q. Would you trace your history in the gypsum wallboard business as generally as you can, beginning with the first time you entered the business, what you did in each succeeding job, giving functions, the dates within which you held these various and sundry jobs.

A. All right, sir.

I was a salesman from late 1949 until sometime in 1958.

From 1959 to 1962 I was a district sales manager.

I said 1962, didn't I?

Q. Yes, sir.

Excuse me for interrupting, but with which companies were you a salesman and district sales manager?

A. When I started in late '49 it was the Certain-teed Products Corporation. In 1950—During the time I was a salesman, the Certain-teed Products Corporation spun-off the Bestwall Gypsum Company, but then created a gypsum [3723] corporation called Bestwall-Certain-teed Sales Corporation. This was in the mid-50's. I don't remember the date exactly. It had very little effect on my sales responsibility or job responsibility.

1958, still with the same organization, I moved to Atlanta as the District Sales Manager.

In 1962 to Ardmore, Pennsylvania as a General Sales Manager of that same sales corporation.

At some point in time, a year or so subsequent to that, I became a Vice-President of that sales corporation.

In 1964, mid-'64, I believe it was, the Bestwall Gypsum Company and the Certain-teed Products Company separated themselves completely by severing the sales corporation and also bodily, physically, moving the Bestwall Gypsum part of the—what was left to another location in the general area, Paoli, Pennsylvania.

We then operated as the Bestwall Gypsum Company, per se, with their own sales department, our own traffic department, our own accounting, everything else which had been combined in the past as a separate entity and in that posture until the merger with Georgia-Pacific in 1965.

Q. Then what happened?

A. 1965 the merger came about in late April. My job responsibility continued. Of course—excuse me. I left out one episode.

[3724] During the time that we were in Paoli, I was made a corporate officer of Bestwall Gypsum Company. I think it was in 1964.

When the merger came about, the Bestwall Gypsum Company was dissolved and I became the Division—Gypsum Division, at that time they called it Bestwall Division of Georgia-Pacific—I became the Vice-President of Sales of the Division.

I remained in that capacity until June of 1969, when I transferred out of the gypsum altogether into another division of Georgia-Pacific, moving away to Ohio.

Q. What was that?

A. It was the Weather-seal Division.

Q. Weather seal?

A. Weather seal Division.

I became General Manager of the Weather Seal Division in Barberton, Ohio.

I remained there approximately a year, moving back to Portland, Oregon in 1970, where I was—my title was National Account Executive for Building Products.

I remained——

Q. Was that for the big customers?

A. Beg pardon?

Q. Was that for the big customers?

A. That was for the accounts that were classified as [3725] larger, trade factors.

Q. Mixed loads, that type of customer?

A. Right.

Then I remained in that capacity until 1973, September 1st, I think it was, when I chose to take early retirement from Georgia-Pacific, moved back to the Atlanta area from whence I came, and for a while I was a consultant, or did nothing particularly as far as representing the company was concerned.

January 1st, 1974, I became an employee of the Flintkote Company and my title now, at this point in time, is Regional Manager for Flintkote Supply, which is a division of The Flintkote Company.

• • • • •

[3731] • • •

Q. What was the market like in 1965, Mr. McCaskill? How were prices?

A. As I recall, it was a hectic year. Housing—gypsum related quite closely to housing starts. They were depressed. Everybody was scrambling for business.

Q. Was there over-capacity in existence in the marketplace at that time?

A. I believe so. Yes, sir.

Q. Had some companies, in anticipation of a housing boom, expanded their capacity in previous years?

A. The industry had expanded.

Q. And also new competition came on the scene in the form of single-plant producers—Texas Gypsum, Republic Gypsum, and American Gypsum—which created more capacity; is that correct?

A. My recollection is that American Gypsum had been in existence for some time. I could be wrong.

Q. But they were in existence in 1965, in any event?

[3732] A. Yes. They were, of course.

• • • • •

In 1962, so we can form a comparison, in 1962, what was the state of construction? Was your capacity being utilized?

A. It seems to me that the supply-demand balance was—it was in pretty good shape.

Q. How would you contrast 1962 with 1965? How do they compare?

A. Well, '65, as I said, everybody was scrambling for business.

Q. Were prices more stable—excuse me. I didn't mean to interrupt you.

A. Including Georgia-Pacific.

Q. In 1962, would it be fair to say that the prices were stable?

A. Yes.

Q. Would it also be fair to say that, in the vast majority of instances—excuse me—Bestwall was obtaining its published list prices for its wallboard?

[3733] A. I think that's a fair statement; yes, sir.

Q. Is it also fair to say that, in 1965, there were substantial numbers of deviations from published list prices?

A. Yes, sir.

• • • • •

[3772] Q. Is it fair to state that from a pricing standpoint that 1965 was not only a lousy year but almost a disastrous year for the gypsum industry?

A. It was hectic, sir.

Q. Discounts all over the place; weren't there?

A. Right.

Q. Even to key accounts?

A. Yes, sir.

• • • • •

[3775] • • •

Q. Well, were you giving 5 percent to key accounts, Mr. McCaskill?

A. He says—Would you mind if I refer to what he said again?

Q. Not at all, sir, if it will help you.

A. "Subject to a 5 percent discount to key accounts." I don't know whether we were or not, sir. That was 10 years ago, and I really, I honestly, Mr. Fricano, I don't know what his interpretation is at this stage of what a key account means.

Q. Well, is the language clear, sir?

A. The language is clear, yes, sir.

Q. Have you ever heard the term "key accounts" before?

A. Indeed I have.

Q. What is a key account?

A. It would be a large dealer. It could be a large user. It could be a commercial kind of an account.

• • • • •

[3792] • • •

Q. 175, please.

Can you identify 175?

A. Yes, sir, I can identify it.

Q. What is it?

A. It is a handwritten note from me to E. L. Mongold and R. Sikes.

Mr. FRICANO. I offer the exhibit.

Mr. MELLOTT. No objection, Your Honor.

[3793] The COURT. It is admitted.

[Government Exhibit No. 175 was received in evidence.]

By Mr. FRICANO:

Q. This reads as follows in Mr. McCaskill's own handwriting:

> Please give me a current listing of the markets where JM—Johns Manville—is deviating from industry merchandising policies. As far as possible list accounts, names of salesmen and other particulars.
>
> I will be going to New York soon to handle.
>
> Destroy this.
>
> Signed McCaskill.
>
> P.S. I will add details on the Atlanta situation.

Can you account for that one?

A. I vaguely recall it, sir.

[3794] By Mr. FRICANO:

Q. Why did you want to destroy, Mr. McCaskill?

A. I don't know, sir. This was written in—there is no date on it, is there?

Q. It says January 17. The year is not there.

A. Probably '63 or 4. I don't know, sir. I have no recollection of why I wanted it destroyed.

Q. Now, Mr. Sikes did exactly what——

Mr. FRICANO. Excuse me. I am sorry, Your Honor.

By Mr. FRICANO:

Q. Now attached to this is the information which you requested from Mr. Sikes, is it not?

A. It could be, but I am not sure, sir.

Q. Well, I couldn't testify to that, just like I don't know what date this is.

Q. You wanted a listing of the current market where J-M was deviating from industry merchandising policies and you wanted a list of the accounts, names of the salesmen and other particulars and you would handle it and then with a little instruction to destroy. Now the attachment says competitive activities, J-M Sales Corp., one, direct sales to applicators by Johns-Manville and there is a listing, is there not?

A. Right.

[3795] Q. How did Mr. Sikes get this information?

A. I have no idea, sir.

Q. Didn't he call Mr. Marion at Johns-Manville and didn't he get it from him?

A. No, sir. I doubt that, but I have no idea how Mr. Sikes got it. He could get it from the field, because if this activity was something that was not good for us, the salesmen would have provided it or the sales managers.

Q. Mr. McCaskill, didn't Mr. Meyer and Mr. Sikes and Mr. Fatz and Mr. Burch have a running dialogue with their counterpart at Johns-Manville on prices, on credit and everything else?

Mr. MELLOTT. If the Court please, I object to that question as being too broad and sweeping with no definitive indication of what he means by running dialogue.

The COURT. Do you know what he meant by running dialogue?

The WITNESS. No, sir, I don't.

The COURT. Clarify the question.

[3796] Q. Is it not the fact, Mr. McCaskill, that, for the entire period that you were an official of Georgia-Pacific and Bestwall, that your subordinates, Mr. Meyer, Mr. Sikes, Mr. Burch, and Mr. Fatz, had telephone conversations with their counterparts at Johns-Manville Corporation on prices, on credit terms, and on other competitive matters?

A. I will have to answer you this way, Mr. Fricano. Those people, in my behalf, administered the contract with Johns-Manville, and Johns-Manville was a 10 to 15 million dollar customer of ours. The cost basis of Johns-Manville was based on the market pricing basis. It had to be.

Certainly, these people had to communicate with Johns-Manville in that regard, as related to their costs, and they did so systematically, both on the telephone and, periodically, when we sat down to review the terms of the contract or a revision of that cost.

Q. All right. Now, isn't it the fact, then, given your answer, now, Mr. McCaskill, that the place where Mr. Sikes got all this competitive information from was right in the middle of headquarters at Johns-Manville?

A. No, sir. As far as I am concerned, that is not a fact. Mr. Sikes had complete means to develop this information from the field sales force of the gypsum division of Georgia-Pacific.

Q. Is it your testimony, sir, that your subordinates [3797] never called Johns-Manville officials to ascertain whether or not they were deviating from a price?

A. No, sir. It is not my testimony.

Q. Did they?

A. They could have.

Q. Well, when they did it, didn't they talk about customers?

A. Well, I would believe, Mr. Fricano, that they carried on the same verification process that we carried on with other people, which had been the practice all along.

Q. Well, then, why did you answer my question that Mr. Sikes and Mr. Meyer weren't doing that?

Mr. MELLOTT. If the Court please, I submit that this is repetitive and does not correctly reflect the testimony of the witness. This matter has been gone into at length, now. Mr. McCaskill has explained that he doesn't know specifically where this information came from on that sheet.

I point out that there appear to be two pages missing from this exhibit, also, Your Honor, based on the numbers that appear at the bottom, and I object to the question for the further reason that it is argumentative.

The COURT. Well, rephrase the question if you feel it is important to do it.

Mr. FRICANO. All right, sir.

[3798] By Mr. FRICANO:

Q. I believe you testified earlier, in response to my question, Mr. McCaskell, that your subordinates did not call and find out about prices and other matters at Johns-Manville. Didn't you testify to that?

A. No, sir. I don't recall. I would like to have it read, if I did testify that they didn't call J-M and discuss prices. I merely amplified or, rather, qualified their relationship with Johns-Manville and the dialogue that they carried on. I don't believe that I denied anything in the way that you put it.

Q. Well, did you include, in your long answer, the fact that, from time to time, your subordinates checked prices with Johns-Manville?

A. Well, I just acknowledged it to you a minute ago, sir, that we carried on a verification——

Q. That's not my question, Mr. McCaskill.

Mr. MELLOTT. May the witness finish the answer, please?

The COURT. Let's not discipline the witness.

Go ahead. Finish your answer.

The WITNESS. I just acknowledged, a second ago, when you asked me the direct question, that—whatever direct question it was—that we carried on a [3799] verification practice with Johns-Manville, just as we did with other competitors.

By Mr. FRICANO:

Q. Didn't you testify, just a moment ago, that the information contained—the information which you requested of Mr. Sikes, on this memorandum that you wanted destroyed, could not have come from Johns-Manville?

A. No, sir. If I did, I stand corrected.

Q. All right.

A. I didn't testify to any such fact. I don't recall hearing any such question.

The COURT. Well, we will let the jury rely on their recollection.

The WITNESS. I testified that this, more than likely, was, and probably was developed in the field. That's the best source of competitive information, and Johns-Manville, in this sense, was, indeed, a competitor.

• • • • •

Q. Now, all these contacts with your competitors—did you write them down?

Mr. MELLOTT. If the Court please, I object to that, and I apologize for interrupting before [3800] the question is finished.

The COURT. I haven't heard the question.

Mr. MELLOTT. But there is no testimony as to "all of these contacts."

The COURT. Finish your question so I can hear it.

By Mr. FRICANO:

Q. Did you directly and through your subordinates, from time to time throughout your tenure at Georgia-Pacific have contacts with your competitors on price deviations? Yes or no?

A. We followed the verification practice in contacting our competitors from time to time.

Q. So the answer to my question is yes; is that correct?

A. Yes.

Q. When you did this, and when your subordinates did it, did they make a record, a handwritten record, a typed record, of those contacts?

A. Not formally, that I recall, sir.

• • • • •

[3823] • • •

Mr. KECK. In regard to the motion for mistrial I made yesterday, Your Honor was correct in that he had—and pointed out to me, fortunately, yesterday afternoon, through the reporter's notes—instructed the jury to ignore Government Exhibit 22 and the interrogation regarding it, and I am very appreciative for what Your Honor did. But 10 pages thereafter, the prosecutor again did the very same thing in disregard by asking a question, at page 3673: "Yet, even with respect to those products, you violated the company policy as depicted in GX No. 22."

Now, it is true, Your Honor then sustained an objection, but the prejudicial effect of that being an alleged policy that the witness allegedly was violating had been done by the prosecutor, and that was the basis of that motion, Your Honor.

[3824] The COURT. Well, I don't think sufficient harm was done to justify a mistrial, and I am sure that Mr. Fricano didn't intentionally violate the rulings, go contrary to the rulings of the Court.

I think he was probably carried away by a little emotional zeal, as everybody is on some occasions.

Was there anything further you wished to say?

Mr. KECK. No, sir.

The COURT. All right. Bring in the jury.

You weren't renewing your motion for a mistrial?

Mr. KECK. No, sir. I was simply clarifying the fact that I felt he had intentionally violated your Court orders:

• • • • •

[3847] • • •

The COURT. You don't have a less squeaky pen some place?

Mr. FRICANO. Well, maybe Mr. Hiering will give me his black crayon.

The WITNESS. Thank you, Your Honor.

Mr. FRICANO. Thank you.

Mr. DEADMAN. You bet.

Mr. DELONE. See if this is any better, Mr. Fricano. I hope it doesn't squeak. It makes a bigger line.

Mr. BARTLIT. Your Honor, may I have, throughout this trial, a standing objection to the making of charts of the witness' testimony, whether it is prosecution or USG or whoever?

The COURT. You may have it, but it is just standard procedure in this district to allow people to use blackboards or easels and to write on them during the course of the testimony. However, you may have that objection.

Mr. BARTLIT. I understand that, Your Honor.

[3848] By Mr. FRICANO:

Q. All right. Now, I am going to put a date up here, September, 1965——

The COURT. Mr. Fricano, just a moment. The reason an exhibit number is put on it is that I feel, when people write on a blackboard or write—we are using that paper in lieu of the blackboard—that what they write should somehow be preserved, and that's the reason for the exhibit number.

Mr. DELONE. While you are interrupting, I would like to make clear I join in Mr. Bartlit's position. I think it unduly extends the trial to try to summarize testimony by this process.

The COURT. Mr. DeLone, you know this use of blackboards and writing by counsel is not at all unusual.

Mr. DELONE. I know it isn't, but I think to summarize the type of testimony we have here is unusual, sir.

The COURT. All right. You have your objection.

• • • • •

[3854] Q. Well, did your subordinates check with Mr. Atwell at National Gypsum?

A. In this regard?

Q. Sure.

A. I don't know that, sir.

Q. It says, here, they checked.

Mr. MELLOTT. It does not. If Your Honor please, I object to counsel mischaracterizing what the document says.

[3855] Mr. FRICANO. I just read it, Your Honor.

The COURT. All right. The jury has heard it. The jury has heard your objections. They can determine whether it's——

Mr. MELLOTT. It does not say that there was any check.

The COURT. Now, don't go further, because you have objected, the jury has heard the letter, and it is for them to say whether it misrepresents or not.

Mr. MELLOTT. I agree with that, Your Honor, but when counsel makes——

The COURT. Fine. Let's not discuss it any further.

• • • • •

[3877] Q. Can you identify that document?

A. Yes, sir. It looks like the original of a handwritten note of mine.

Q. It is your handwriting, isn't it?

A. Indeed, it is.

Mr. FRICANO. I offer the exhibit.

Mr. MELLOTT. No objection.

The COURT. Admitted.

[Government Exhibit No. 761 was received in evidence.]

By Mr. FRICANO:

Q. Mr. McCaskill, that exhibit is dated December 16, 1966, correct?

A. Yes, sir.

Q. And it states in your handwriting, does it not, "Jim Hague."

Who is Jim Hague?

A. Jim Hague was a gentleman with Kaiser Gypsum Company.

Q. And underneath that it says, "Price protection of public housing jobs in part," does it not?

A. In past or in part. I don't know. My handwriting gets cold on me sometimes.

[3878] Q. How is your memory, Mr. McCaskill?

A. It does, too.

Q. And then it says, "Jobs in GA"—I assume Georgia—"Mason and Atlanta," correct?

A. Yes, sir.

Q. And then you have a doodle there, correct?

A. Right.

Q. And then it says, "Policy now is none whatsoever, except those two jobs that they are stuck with."

Mr. McCaskill, did you talk to Mr. Hague and ascertain from him what Kaiser Gypsum's policy was with respect to job price protection at this time?

A. I can't recall, sir, whether I did or not. I made these notes, obviously, for or on information based upon Kaiser's job protection activity. Whether I talked to him or not, I really can't recall.

Q. Was this another instance, Mr. McCaskill, where all this good information was coming up from the field?

A. I am not sure that it was or it wasn't.

Q. Mr. McCaskill, did you, from time to time, exchange job price protection information with Jim Hague of Kaiser Gypsum Company?

A. Personally, if I did, it was very, very infrequently.

Q. Well, now, this happens to be one note, correct, Mr. McCaskill?

[3879] A. One note, yes, sir.

Q. Now, how many notes you think we have—I withdraw that.

You did not, did you, make a record, nor did you instruct your subordinates to make a record of their contacts with competitors, correct?

A. No, sir.

Q. Now, how are we—and now you say——

Mr. MELLOTT. If the Court please—

Mr. FRICANO. We have no record——

The COURT. I have not heard the question yet.

By Mr. FRICANO:

Q. And now you say when we have no record, those contacts were infrequent.

A. I testified, sir, that my personal contacts with Mr. Hague in regard to price verifications were very, very infrequently.

Q. This is a job price verification, Mr. McCaskill?

A. This apparently—it refers to a job protection problem or situation.

Q. Is it a verification, sir?

A. I can't say that it is a verification or not, Mr. Fricano. I would like to be able to help you. I truly would. I have no recollection of this, even though it is [3880] in my handwriting. It is dated 12-16-66.

Q. And that was 10 years ago?

A. Yes, sir.

The COURT. Nine.

Mr. FRICANO. I can't add.

By Mr. FRICANO:

Q. It says, "Policy now none whatsoever execpt these two jobs that they are stuck with."

Now, Mr. McCaskill, try to recall, sir, didn't Mr. Hague talk to you on the telephone and didn't you extract from him the information that Kaiser's policy is no job price protection except those two jobs you listed up above, and he told you that they were stuck with them?

A. I can't say that for a fact, sir. This information could have come to me in two, three different ways. It could have come from the field. It could have come from our own people. Conceivably, it could have come from Mr. Hague.

• • • • •

[3883] • • •

The COURT. Gentlemen. Mr. Mellott, you have a motion?

Mr. MELLOTT. If the Court please. I regret the necessity to do this, but I believe that counsel for the Government again, in his over-zealous way, has made remarks in front of the jury which, whether intentional or not—but, since they were made, apparently they were intentional—which were designed for no purpose other than to prejudice the situation unfairly against the Defendant Georgia-Pacific, when he commented with reference to, "Didn't Mr. Sikes say that the lawyer didn't know what he was talking about," or words to that effect. I don't have the benefit of the transcript right in front of me, Your Honor. This is [3884] in reference to a lawyer who wrote a document, which the Government introduced into evidence. I did not introduce it; the Government did, and now they try to attack it by a statement like that in front of the jury.

It was followed with another question designed to create the same inference, and I, therefore, move for a mistrial.

The COURT. Mr. Grainer.

Is he here?

Mr. KEENE. No.

The COURT. Ask Mr. Grainer to find out how soon we can have a panel to select a new jury.

Does everybody concur in this motion?

Mr. Keck? Mr. Keck?

Mr. KECK. Yes, sir.

The COURT. You concur in the motion.

Mr. DeLone?

Mr. DELONE. Yes, sir.

The COURT. Mr. McSweeney?

Mr. MCSWEENEY. Yes, Your Honor.

The COURT. Mr. Warnke?

Mr. WARNKE. Yes, Your Honor.

The COURT. Have I skipped anyone?

Mr. FRICANO. Mr. Bartlit.

The COURT. Mr. Bartlit?

[3885] Mr. BARTLIT. It is a tough question, Your Honor.

The COURT. Yes. I want to see if everybody concurs. Then I will talk to the—well, let's see if everybody concurs.

Mr. BARTLIT. Can I talk to my client for a second, Your Honor?

The COURT. Yes.

Now, we will go off the record a moment.

[Discussion was held off the record.]

[A brief recess was taken at 11:20 a.m.]

[3886] Mr. BARTLIT. Your Honor, briefly. Representing an individual, as I do, I am distressed to contemplate another trial, in going through these weeks again. Mr. Watt is equally stressed. We are all stressed at the thought of a judge unfamiliar with this case getting involved in it, as Your Honor contemplates might be the case.

Nevertheless, I sincerely feel—and I have a personal relationship with Mr. Fricano that is of the highest—and I am sure he would tell you this. Nevertheless, I felt that the cross-examination of Mr. McCaskill transcended the bounds of what a prosecutor ought to do.

My feeling, as counsel to Mr. Watt, I feel that if I did not join the motion that I would be sanctioning that, and therefor I must regretfully, under the circumstances, join the motion of the other defendants.

The COURT. All right. I will reserve judgment on the motion.

Did you have something you wanted to put on the record, Mr. Fricano?

Mr. FRICANO. Just briefly, Your Honor. That I do not believe that there are grounds for mistrial, and I can demonstrate both with the record and the questions that were asked any time. It is that simple.

The COURT. Well——

Mr. FRICANO. I mean, I don't want to [3887] take the time of the Court now and the jury, but if the Court wants arguments . . .

The COURT. Before I pass on the motion I will.

Mr. FRICANO. I think there is some confusion. With the facts here—if I can just briefly state them—it is not the Crowell memo, the lawyer's memo, that I was attacking. I did not attack this. The witness said there is another lawyer who makes, who approves what Mr. Sikes is doing. That is not Mr. Crowell, that is Mr. Smith. It is another lawyer entirely. It is not Mr. Crowell, or Mr. Crouell—whatever way he pronounces his name.

So the question, under these circumstances was perfectly proper. It was directed not at the Crowell memo, but as to

whether or not Mr. Sikes in fact had a lawyer, Mr. Smith, Robert Smith, sitting there in his office taking care that Mr. Sikes did the right thing. That's as simple as that. There is nothing mysterious about it. There is no predation on my part in it. I conceived of it to be a perfect question to a hostile witness under the circumstances.

And I can support everything. Every question I have asked this man I can support with the record in this case and the record of the entire proceedings. There was no question that I asked that was not supported by the record.

[3888] The COURT. Does anybody else want to make any argument in the matter now?

Mr. BARTLIT. I would say briefly. Your Honor, that it goes beyond the—whatever the technical state of the record is, the process of saying to the witness, "Isn't it a fact that Mr. Sikes in effect told the Grand Jury something else about somebody else?" which the Court recognized as an improper way of proceeding.

There are a number of things that have occurred throughout the trial which no single one perhaps is sufficient, but they are cumulative.

And it is true, Your Honor is absolutely right, and as far as I understand the law, that a prosecutor and defense counsel has to have some leeway. In my view. And sometimes these things don't show up in the record the way they should, in my view. Mr. Fricano's examination, the skipping around—I think in my view—questions which were misleading, the tone of voice, the whole thing, transcended those bounds and is not a search for the truth but is an effort to get the witness to say things that aren't supported by the record. That would be the position I will take on that motion.

The COURT. All right.

Bring in the jury. We will proceed.

After careful review, and after thought on the [3889] matter, I will reach a decision on this matter later.

Mr. MELLOTT. Thank you, Your Honor.

Mr. FRICANO. I would appreciate further argument if necessary, Your Honor.

Mr. DELONE. There was one thing I wanted to point out to Your Honor, which is the same reference I raised the other day, where there is no question in my mind the record did not in any way support the prosecutor's remark.

I went to get the transcript, but it is locked up. But if we are going to have argument later, I can show it to you then, sir.

The COURT. We might have argument Friday. I will see.

• • • • •

[3898] Q. Now, who is Joe Marion?

A. Joe Marion. There is a Joe Marion with the Johns-Manville Sales Corporation who administered their gypsum affairs.

Q. And is it not the fact, sir, that from time to [3899] time your subordinates talked to Joe Marion at Johns-Manville on competitive matters such as this?

A. We verified with Johns-Manville, as we did with our other competitors, following the procedures, sir, that our legal people had prescribed.

Q. Is this a verification, Mr. McCaskill?

A. I have no idea, sir.

Q. Well it says: "No price protection discussed with Joe Marion."

A. I am not sure that says "discussed." You could be right. If it says "discussed," this could be a price verification call.

Q. So I gather, any time that you or one of your subordinates calls a competitor on prices, it is a price verification; is that right?

A. Any time?

Q. Any time.

A. Will you restate that, sir?

Q. I will try.

The COURT. Would you read it back, please?

[Last question read.]

The WITNESS. Related to Johns-Manville, I couldn't answer that in the affirmative. I testified, I believe, yesterday that the administration of the Johns- [3900] Manville contract was necessarily tied to marketing pricing on their cost basis.

Q. How about your competitors, Mr. McCaskill?

A. The other competitors, we carried on transactions with them, sir. We licensed them. We had revenues of well over a hundred thousand dollars from revenues and Type "X" board. We sold them joint system. I mean we bought from them.

Q. Exclude all those.

A. Okay.

Q. I am only talking about when you called your competitors or your subordinates called your competitors, or your competitors called you or your subordinates.

A. Right.

Q. And talked about prices. Was that was is known as a price verification in your parlance?

Mr. MELLOTT. If the Court please, I object to the form of that question. I do not believe it is sufficiently intelligible for the witness to answer it in that framework. He has explained the difficulty he has.

The COURT. You made your objection. The objection is overruled.

The WITNESS. Price verification in my parlance——

By Mr. FRICANO:

[3901] Q. Whenever you talked to your competitors.

A. Would you let me finish, please, sir?

Q. I am sorry, Mr. McCaskill.

A. Price verification, as you asked, I believe——

Q. I didn't——

The COURT. Let him finish what he wants to say.

Mr. FRICANO. I am sorry.

The WITNESS. In my parlance is the practice of discerning from the competition, based upon the in-house legal advice that we had on the validity or the truth of a given situation, following the procedures that were laid down.

By Mr. FRICANO:

Q. Mr. McCaskill, didn't you testify on another occasion under oath that when you and your subordinates discussed with United States Gypsum the elimination of applicator kickbacks in the northwest, didn't you testify that that was a vivid example of verification?

A. You'd have to let me see the testimony, sir. I can't answer that based on the way you asked it.

The COURT. All right. Let's do it by reading it to the witness and saying: "Were you asked?" And "Did you say?"

• • • • •

[3902] The COURT. And identifying where and when.

Mr. FRICANO. At page 495 in his testimony on October 9, 1973 before the Grand Jury, Your Honor.

The COURT. All right.

By Mr. FRICANO:

Q. All right.

Were you asked these questions and did you give these answers? I was asking questions at the time. Is this the way you defined verification, Mr. McCaskill?

> Question. Again. In Mr. Meyer's note here, procuring of eliminating applicator allowances in Portland with Mr. Gimlin was that verification?

And then I went on——

> Question. Let's ask you again what verification is? Is an example of verification the information as it is contained in this entire exhibit, 241-A?
>
> Answer. Is that an example?
>
> Question. Yes.
>
> Answer. This is certainly a very vivid example, yes, sir.

Was that your testimony?

[3903] A. If you read it from the record, sir, that's my testimony.

Q. Is it still true today?

A. I would like to see the document.

[3904] Mr. FRICANO. It has now been marked 371 in this proceeding.

May we have 371, Mr.——

The COURT. Is that the Grand Jury transcript you are looking for?

Mr. FRICANO. No, it was the document he was shown in the Grand Jury.

If Your Honor please, I have an exact copy. I will give it to him if I may.

The COURT. All right.

[The witness looks at the document.]
The WITNESS. I have reviewed the document, sir.

• • • • •

[3905] Q. I had asked you what your definition of verification was, and you just gave one, and then I said is it also a fact—I read your Grand Jury testimony to you where you stated that the elimination of applicator allowances in Portland is a very vivid example of verification, and you asked if that was true.

A. Did I say that precisely?

Q. Well, I will read it back to you again.

A. Yes, sir, please do.

Q. Your answer was: "You say is that an example?"

Question. Yes.

Answer. This is certainly a very vivid example, yes, sir.

That is your testimony.

A. All right, sir, that is my testimony.

Q. All right. Was it true?

A. Is it true that is a vivid example of verification?

Q. Yes, sir.

A. If this verification process determined the truth, yes.

• • • • •

[3929] Q. Well, he wrote this to you, did he not?

A. Of course he did.

Q. Did you understand what he was talking about or did he always write things you didn't understand?

A. Well, he was—he was a pretty good writer. He got through to me. At least I knew what his meaning was.

Q. But you don't understand his meaning here?

A. No, I don't know if others don't fall in line, he is mentioning, Mr. Fricano, Myland drywall. He is mentioning Pete King, who is, to my recollection, one of the biggest applicators in the country. He is mentioning Big Horn. He mentions Pabco. He mentions Kaiser. All others could have meant all of those, as far as I know. You are asking me to interpret something that was stated ten years ago. I don't know how on earth I can say what others mean.

Q. You see the——

Mr. MELLOTT. If the Court please, I object to this as repetitive and argumentative. I think the witness has answered.

The COURT. Did you want to ask another question about it? Go ahead.

Mr. FRICANO. One more question.

By Mr. FRICANO:

[3930] Q. In your answer you said it could have been Pete King, it could have been dealers, it could have been salesmen, etc. Why didn't you include your competitors?

Mr. MELLOTT. If the Court please, his answer did include the competitors. It misstates the answer.

Mr. FRICANO. If Your Honor please, I am not misstating.

The COURT. Does that conclude your immediate inquiry on this matter?

Mr. FRICANO. Yes.

• • • • •

[4047] By Mr. FRICANO:

Q. Well, you recall—and I want you to take GX 16 right now, if you would, please, sir—now GX 16 we already questioned you on and I believe it has almost been read in its entirely by me or by Mr. Mellott. That is the one from the lawyer John Crowell to Mr. Hunt dated November 1, 1966. There is a cover letter on top of it. Do you see that now, sir?

A. By the cover leter, you mean from Mr. Hunt to Mr. Frederick?

Q. That is right.

A. December 2nd, yes, sir.

• • • • •

[4048] • • •

Q. Now in that memorandum, the cover memorandum from the Executive Vice-President to Mr. Fredericks, who was then the President, your superior, was he not?

A. Yes, sir.

Q. In that cover memorandum he discusses or outlines those factors relating to the exchange of prices, does he not?

A. He does. He covers point-by-point Mr. Crowell's recommendations, right, and Mr. Hunt responds point-by-point.

Q. With respect to point No. 4, on that, you will have to refer back to Mr. Crowell's recommendations to find out exactly what point No. 4 is.

[4049] No. 4 in his recommendations was a memorandum record should be kept of all such confirmatory contracts, right?

A. That is right.

Q. Mr. Hunt says about that, "4, this might be a good thing to do, but I doubt that we have been doing it. You might check with the boys and use your own discretion."

Isn't that correct?

A. Yes, sir.

Q. As far as you can recall, Mr. Crowell's recommendations and Mr. Hunt's interpretations or suggestions resulted in no records being kept of these calls, correct?

A. Well, Mr. Fredericks did not, to my recollection, instruct me specifically to have my people carry on this practice.

• • • • •

[4084] Q. I just asked if you gave the pricing structure to Mr. Atwell of your distribution warehouses and you said you did not recall.

If you will look at 48, it reads, does it not, "R. Sikes call K. Atwell. Give him Oklahoma City out of warehouse pricing structure."

Does that refresh your recollection, Mr. McCaskill?

A. I obviously wrote this, yes, sir. I don't have any specific memory of anything that long ago.

Q. And the attachment from R. Sikes to C. R. Boone states, "Wire me today pricing structure of the Oklahoma City branch on out of warehouse sales of gypsum board products."

So, Mr. Sikes followed your instructions, did he not?

A. Apparently he did, sir.

Q. And Exhibit 49 is from Richard Boone, the fellow at the warehouse out there in Oklahoma City to Mr. Bob Sikes, the same day, March 2, 1966, and he says as follows:

> Re Oklahoma City branch price structure prices are $3.00 over our published carload price or $39.00 per [4085] thousand square feet on pickups of one-half inch board one-half delivered. To a dealer who has a forklift, the price is $44.00. If the dealer does not have a forklift, the price would be $46.00. All other items same basis.

End of teletype.

What does it say at the top of the page in handwriting, Mr. McCaskill?

A. It says, "Called K. A. 3/4/66."

Who is K. A., Mr. McCaskill?

A. Who is K. A.?

Q. Yes, sir.

A. I don't mean to be facetious. I am K. A. McCaskill. I would imagine this K. A., following the sequence of this documentation, would be Ken Atwell.

Q. Vice President of National Gypsum Company?

A. I don't know if he was vice president then or not.

• • • • •

[4086] Q. Is that a price verification, Mr. McCaskill?

A. I would call this a price—I would characterize it as a price verification.

• • • • •

[4088] Q. Didn't, at this time, National Gypsum Company have a plant in Savannah, a producing plant?

A. Yes, National Gypsum had a plant in Savannah, right.

• • • • •

[4092] • • •

Government Exhibit No. 73 was received in evidence.

• • • • •

Q. Mr. McCaskill, we will go to the back page, the last page, wherever yours is there, in this series of documents, the document dated July 14, 1966.

Now, you say that's your handwriting, correct?

A. Yes, sir.

Q. Now, what are the two words right in the upper left-hand corner of that document?

A. "K. Atwell, warehouses."

Q. And who is "K. Atwell"?

A. K. Atwell in this case would be the gentleman we have just finished discussing on the other documentation, National Gypsum employee.

• • • • •

[4094] Q. Now, does this refresh your recollection now, Mr. McCaskill?

Did you have a lengthy telephone conversation with Mr. Ken Atwell at or about this time concerning various distribution prices from your warehouses in Atlanta and Savannah and Lafayette?

A. Mr. Fricano, I'm sorry, I simply cannot recollect, recall——

Q. All right, sir.

A. ——a long conversation with Mr. Atwell.

This information no doubt came from Mr. Atwell. It could have come from one of my subordinates.

Q. All right, sir. What?

A. Through one of my subordinates. I don't know that [4095] it came from him directly.

• • • • •

Q. Now, what does that say? It says "Bob" correct?

A. Yes.

Q. Now, who's "Bob"?

A. Bob would be Sikes.

Q. "Call Kenny." Who's "Kenny"?

A. It would be Atwell.

• • • • •

[4112] • • •

We will argue, then, those three motions tomorrow morning, and, since the mistrial motion is to be argued at length, apparently, we will do that at a different time, and will do it on a Friday morning, as soon as I have a Friday morning which is available, because I am not going to have the jury stand by while we get into that, so I will set either a Friday morning——

Will you get me my desk calendar, please? I think this Friday we have another hearing. That little book that the secretary—my pocket secretary.

Mr. Bartlit. Your Honor, I might suggest that, that being the case, there are a number of other grounds for mistrial, which we have made before and not argued, which are similar.

[4113] The Court. That is why I am going to set a time down for it, and we will argue. Everybody can argue everything they want along those lines, but we can't do it with the jury sitting outside. So, as soon as I get my calendar, I will attempt to set a date for that.

Is time of the essence on this?

You see, one of the reasons I am bringing this up now, it seems to me to be somewhat unfair to postpone arguments on a motion for a mistrial and ask you to go ahead with the case. It seems to me you are entitled to a ruling on that, but the problem is a time to do it.

Now, does anybody feel that time is of the essence in the argument of this motion?

Mr. McSweeney. I feel that the motion for mistrial is important to take up as promptly as we can.

The Court. Fine. We will have to have—if that is the way you feel, we will have it on Saturady morning, April 12, at 10:00 o'clock, and we will have all day Saturday to argue it.

That is what has been worrying me, that somebody would say we shouldn't be asked to go ahead with the testimony while we have a motion for mistrial pending, so we will do it on Saturday, April 12, at 10:00 o'clock in the morning. Then you can take as lon gon Saturday as you want to.

• • • • •

[4115] The Court. Gentlemen, go ahead.

By Mr. Fricano:

Q. Mr. McCaskill, immediately prior to the recess I had asked you whether or not the handwritten draft dated July 14 of the TWX was in fact ultimately the TWX dated July 14, 1966, which is Government Exhibit No. 75, and I believe you had made a comparison and you said that it was.

A. Well, it is a combination of Mr. Sikes—if this is Mr. Sikes' writing—and my own, a combination of the two.

Q. All right.

Now keeping that in mind, if you would, please, isn't it a fact that you gave out these future prices on the distribution center wasehouses in order to keep National Gypsum from dropping the prices in your market from its Savannah plant?

A. I don't know if that is a fact, no, sir.

Q. I want to read the telegram that you and Mr. Sikes sent to Mr. Schuermann in Atlanta, Georgia.

> We have reports that Savannah branch is selling board out of warehouse at $1.24 per thousand square feet above dealer cost. This is contrary to new pricing structure of 5 per cent above dealer cost. Case in point is Doug Ashy Lumber Company.
>
> Alex tells me that Mr. Dennison——

[4116] You are Alex, aren't you?

A. Yes, sir.

Q. "Alex tells me Mr. Dennison has assured us of the publication of a 5 per cent markup over carload for pickups."

Who is Mr. Dennison?

A. Mr. Dennison was the regional manager for the southeast part of the country in the distribution division.

Q. Of Georgia-Pacific?

A. Of Georgia-Pacific.

Q. And he assured you there would be a 5 per cent markup over carload for pickup?

A. Apparently he had. He assured us of the publication of same.

Q. Now the next paragraph reads as follows:

> Unless there are severe competitive conditions from another wholesaler forcing a deviation from this published price, this action will probably force National Gypsum, who has plant in Savannah, to position their dealers with discounts.

Is that correct, Mr. McCaskill?

A. That is correct as you read it, yes, sir.

Q. Does that refresh your recollection, sir, that the reason why you gave out this information to Mr. Atwell was because you didn't want them to drop the price in your [4117] marketing area?

Mr. MELLOTT. If the Court please, I object to the form of the question. It assumes something that is not in evidence.

The COURT. Overruled.

The WITNESS. In reading the—you want me to answer?

The COURT. Answer the question.

The WITNESS. In reading the paragraph, unless there is some severe competitive conditions from another wholesaler, this I

can't judge. I am sure I was just as concerned about that as I was National Gypsum dropping the price.

By Mr. FRICANO:

Q. Then your answer is you were concerned about National Gypsum dropping the price, United States Gypsum dropping the price, Flintkote dropping the price, Celotex dropping the price and Kaiser Gypsum dropping the price?

A. And other wholesalers, yes, sir.

Q. The competitors?

A. Well, I have to refer to the same thing we are talking about, the subject matter, sir. Unless there is severe competitive conditions from another wholesaler. He could be handling any of the brands of board you just mentioned.

[4118] Q. Then you say this action will probably force National Gypsum, who has a plant in Savannah, to position their dealers discounts. Who would be dropping the price, then, sir?

A. If National Gypsum dropped the price, they would be dropping the price.

Q. And if United States Gypsum followed National Gypsum, they would drop the price too, wouldn't they?

A. If they followed them.

Q. Or if they initiated it?

A. If who initiated it?

Q. United States Gypsum.

A. I don't follow the sequence of the question.

Q. You weren't just worried about National Gypsum, were you, Mr. McCaskill?

A. We were worried about other wholesalers. We were worried about our market position.

• • • • •

[4124] Q. By the way, who was Sand?

A. Sand was a vice president in charge of the Georgia-Pacific distribution division, headquartered in Portland.

Q. And he controlled the distribution division, [4125] didn't he, under Mr. Hunt?

A. Yes. He was in charge.

[4140] Q. Now, published prices were important, were they not?

A. Very important.

Q. Now, from the published price you would either get it in a particular instance or you wouldn't get it; correct?

A. Yes. It would be discounted, sure.

Q. But when you gave a discount, from what figure did you discount?

A. Usually—Well, the published price was the basis of discounts, for us at least.

Q. So it is important, the published price is important for two reasons? No. 1, it was your policy to get it whenever [4141] you could; right?

A. Oh, yes. We attempt to realize it.

Q. And No. 2: It was important because if you were going to to give a discount you used the published price as the basic figure from which you gave the discounts; correct?

A. The effective one at that point in time, yes, sir.

• • • • •

What I am going to do now, Mr. McCaskill, is I am going to take you through each price increase as we go along.

Now, we have the September 1965 fire-rated board price increase which we went into in your prior testimony. And you will recall having seen Mr. Sikes' monthly reports subsequent to that increase which indicated that that price increase held. Do you recall that?

A. I recall that Mr. Sikes' observation was that the pricing basis of list prices were holding favorably.

Q. All right.

[4142] Now, you will also recall that you were the first—When I say "you," I mean Georgia-Pacific. You were the first one to announce this price increase?

A. Yes, sir.

Q. Now, do you know whether or not Mr. Watt, a defendant in this case, Vice-President of United States Gypsum, met with Mr. Hunt on July 14th? That would be two weeks after the July 1 announcement by Georgia-Pacific, but prior to the time that United States Cypsum announced its price increase?

A. No, sir, I do not know that.

• • • • •

[4161] Q. All right, sir. Now, on this report of competition, it shows a two dollar per thousand allowance to a drywall applicator; does it not?

A. The form, you mean?

Q. Yes, sir.

A. The form, the top form, yes. Right.

Q. Now, is that the applicator allowance that we have been discussing.

A. This would be an applicator allowance; it would, yes.

Q. An amount over and above whatever discount the dealer who sold to the applicator gets; correct?

A. That is right.

[4162] Q. Okay. Look down in the lower left-hand corner of that first sheet, Mr. McCaskill. Do you see the number one circled? Do you see that?

A. I see that. Yes, sir.

Q. And you see it says, "could be," and then Mr. Sikes' initials underneath?

A. I believe that is right.

Q. Mr. McCaskill, did you and Mr. Sikes and Mr. Meyer, from time to time, when contacting competitors, use a code of one, two, four and five, indicating the major producers of gypsum wallboard, your competitors?

A. I never used a code, sir. I believe that Mr. Sikes and Mr. Meyer had their own means to maintain records of their own.

Mr. FRICANO. May the witness have 113 through 115?

By Mr. FRICANO:

Q. With respect to the code, do you know what Mr. Sikes' and Mr. Meyers' code was?

A. No. I don't, at this point in time.

Q. All right, sir. I direct your attention to Exhibit 114. Do you have that?

A. Yes, sir.

Q. Can you identify it?

A. This is to McCaskill from Mole, a teletype.

[4163] Q. Is that your hand——

A. Dated 2/14/66.

Q. Is that your handwriting at the bottom?

A. That's my handwriting.

Mr. FRICANO. I offer the exhibit.

Mr. MELLOTT. No objection, Your Honor.

The COURT. It is admitted

[Government Exhibit No. 114 for identification was received in evidence.]

Mr. FRICANO. Now, this is a report by Mr. Mole about—I will have to read it.

> 1965 sales southern Utah dealers affected $63,763. 1966 sales projected are $100,000. G–P could bring plywood to Salt Lake, then go to plant. However, they are on tight schedule and they can only deliver in Montana since they are company trucks. We are up against a dealer truck going to southern Utah and delivering out of his yard in Salt Lake. After delivering board all over southern Utah at only two dollars above carload price, the trucks then proceed to Los Angeles, where they pick up produce.

Mr. MELLOTT. Could I ask whether you [4164] referred to the date of that?

Mr. FRICANO. 2/14/66.

Mr. MELLOTT. Thank you.

By Mr. FRICANO:

Q. Now, in order to—in your handwriting, at the bottom of this page, does it not state: "Did you discuss this with number two and what was their attitude?"

A. I certainly wrote that. Yes, sir.

Q. Who or what is number two, Mr. McCaskill?

A. I have no idea, sir.

• • • • •

[4165] Q. Who is the second largest producer in the industry, sir?

A. Who is?

Q. Yes.

A. National, in the gypsum industry, I believe National Gypsum is.

Q. National Gypsum is number two; right?

[4166] A. They are the second largest; yes, sir.

Q. And this is a competitive situation that deals with number two, National Gypsum; does it not?

A. It deals with National Gypsum.

Q. And your instructions to Mr. Sikes is, "Did you discuss this with number two and what was their attitude." Who is number two, and what discussion were you referring to, and what was their attitude?

A. Mr. Fricano, I still can't honestly—I can't tie this number two with National Gypsum Company. Neither can I tie the Georgia-Pacific problem with hauling plywood backhauls with whatever National Gypsum was doing with feed and grain.

• • • • •

[4169] • • •

Q. Now, we got off into that # 2 business because on 371—do you have that in front of you, 371?

A. Yes, sir.

Q. Because on 371, which is the report of competition on applicators allowances, down in the lower left-hand corner of that report of competition is a "1" and it is circled with the words "could be," with Bib Sikes' initials. Do you see that?

A. Yes, sir.

• • • • •

[4171] Q. • • • Now, you will recall from the first page of this document that one of the reports of competition, one of the companies involved is Kaiser Gypsum; correct?

A. That's right.

Q. Now, who was your contact at Kaiser Gypsum?

A. My contact?

Q. Yes, sir.

A. I didn't have any particular contact at Kaiser Gypsum myself.

Q. Didn't you talk to Mr. Hague from time to time?

A. Occasionally.

Q. Now, is there an indication on this document, a typewritten note to you from Mr. Meyer, that Mr. Hague was brought into the act from Kaiser Gypsum?

A. Well, it says here:

"Called Jim H. 10/5/15."

[4172] Q. 10/5/65; correct?

A. I am sorry, '65.

Q. So that would be October 5, 1965?
A. Right.
Q. Now, you are sure that Jim H. is Jim Hague there; aren't you?
A. No, sir, I am not sure. But it could be.
Q. Well, what about the words off to the left in the margin? What do they say?
A. "To J. Hague."
Q. You are sure that is Jim Hague; aren't you?
A. No doubt about that, yes, sir.

• • • • •

Q. • • • Now let's turn to the next page where there are more handwritten notes. Whose handwriting is that on the [4173] next page?
A. On the white piece of paper?
Q. Yes, sir.
A. Mine.

• • • • •

Q. • • • At the top of the page it gives the date of October 19; does it not?
A. Yes, sir.
Q. And then under it it says, "J. Hague—call;" does it not?
A. Right.
Q. Now, that's your competitor from Kaiser, Mr. Hague; correct?
A. Yes.
Q. And it talks about Seattle, Washington, "Jim Ferry Drywall buys from Colonial Supply Company 90 percent from Kaiser, changed to Bestwall 100 percent."
It says that; doesn't it?
A. That's what it says, yes, sir.
Q. Then it says:
"Evergreen Drywall from Palmer Lewis;" doesn't it?

[4174] A. Right.
Q. Then it says at the bottom of the page, "KAM." Now, those are your initials; aren't they?
A. Those are my initials, yes, sir.
Q. "I called Jim Hague. He wants you to call him on 10/21/65. Bob Sikes." Is that correct?

A. They are Sikes' initials, yes, sir.

[4180] Q. All right, sir. All right. Now, does this refresh your recollection at all, Mr. McCaskill, that, after the telephone conversations and the meeting, all competitors in those two states eliminated the applicator allowances?
A. Well, yes, sir. "Applicator discounts were withdrawn in the states of Washington and Oregon." It says so right here.
Q. Now, those contacts between Meyer and Bob G., between you and Hague, or between Hague and you—were they price verifications?
A. I believe that they were, sir.

• • • • •

[4181] Q. All right, sir. Page 495 of your Grand Jury testimony on October 9, 1973. Did you not testify, in response to certain questions, as follows:

Question. Do you recognize that handwriting?

Answer. Yes. That is A. L. Meyer's, and it relates to this thing, here, this report of competition, what we call a commitment, and he was saying to cancel it as of November 1.

Question. Now, is that the result of the verification process, as you practiced it with your competitors?

Answer. Yes, sir. He called and verified here that he got a call that there was an allowance taking place, and this activity, this verification process, was a part of the decisionmaking process, I am sure, that caused the cancellation [4182] of this commitment.

Did you so testify, sir?
A. If that was read from the record, I did, sir.

• • • • •

[4205] Q. • • •

Question. Did you not at this time, [4206] December of 1965 or thereabouts, emulate United Gypsum in the form of also pulling together a list of those jobs for which Georgia-Pacific had price protection?

Answer. We did have such a list.

Question. You pulled it together at this time; did you not?

Answer. We pulled it together in that period, right.

Question. That is the first time you had ever done that; is that correct?

Answer. I don't believe so, sir. I think we had—we may not have had a list per se, but we had exceptions or jobs on report of competition process.

Question. Certainly you could pull them together on a number of different pieces of paper and say that you had that information. But I am talking about a specific list so that you could see exactly how much business you had protected similar to what United States Gypsum had done.

Answer. Right.

Question. That is the first time—is it not—in that form?

Answer. In that form, I believe so, Yes, sir.

[4207] Question. Have you ever done it since then?

Answer. Not to my recollection.

By Mr. FRICANO:

Q. Were you asked those questions and did you give those answers.

A. Apparently I did, sir.

• • • • •

[4209] • • •

By Mr. FRICANO:

Q. Mr. McCaskill, do you know whether or not all your competitors, your major competitors—Celotex, National Gypsum Company, Kaiser Gypsum Company, and Flintkote, Johns-Manville and Fibreboard—also at this time period with respect to this same price increase also put together their own job price protection lists?

A. No, sir, I don't know whether they did or not.

Q. Did you not testify at page 4432 of your Grand Jury testimony on November 2, 1972, and in response to certain questions give the following answers:

Question. Did you know whether any other competitors of Georgia-Pacific had a list similar to yours or United States Gypsum's?

Answer. Not for a fact.

Question. Give us your best judgment.

Answer. In my judgment they had lists, that is why we made the calls.

Mr. MELLOTT. If the Court please, I [4210] object to this form of interrogation. It seems to me again it is not inconsistent with the testimony of the witness and counsel suggests that it is.

The COURT. You know, if you will just object. I really can figure out what the basis is if you will just stand up and object.

Mr. MELLOTT. I am sorry, Your Honor.

The COURT. I am going to sustain the objection because in the Grand Jury he was asked a jundgment, and now he is being asked a fact. And those are two different things.

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[4242] • • •

Q. Now, why are you approving Johns-Manville's price protection list?

A. Well, Mr. Fricano, as explained last week, Johns-Manville's cost basis was based upon market pricing. Job protection was in this instance certainly an integral part on market pricing. We weren't about to give Johns-Manville carte blanche, even though they are our biggest customer. We asked them, in accordance with my instructions to Sikes, to provide us with a list.

Q. Well, then you did control their market pricing?

A. Mr. Fricano, we went over this last week. I can explain, if you'd like.

Q. Can you answer my question, sir, and then give an explanation?

A. No, sir, we didn't control their market prices at all. They had their own prerogative to sell it for whatever they chose.

Q. Didn't you just say that that's the reason why you had a list, because it was integrally intertwined with a market price?

A. To control their pricing. I didn't say that at all, [4243] Mr. Fricano.

Q. Well, if you granted——

The COURT. Just ask the questions and do not argue with the witness.

Mr. FRICANO. All right, sir.

By Mr. FRICANO:

Q. In any event, you told them to put together a list. And they put it together and it was subject to your approval; was it not?

A. No, sir. Their list was the basis for us granting them a cost on "X" amount of footage, Mr. Fricano. It was not to police their list, it was their prerogative. They could protect every job they chose to if they wanted to do so. There is a difference between cost and price, and I think this is quite significant in this regard.

• • • • •

[4249] Q. • • • Who was Mr. Pamplin, again, as of this time?

A. Mr. Pamplin was the chief executive officer and president and board chairman, I believe, of Georgia-Pacific.

• • • • •

[4251] Q. Well, did you ever have an understanding, for example, that you exchange prices with each other?

A. We had a practice that was in effect when I came on the management scene, of verification. If you want to [4252] characterize that as an understanding, I suppose one could, but I don't recall any formal or even written or verbal understanding, per se.

Q. Just that they asked you for information, and you gave it, and you asked them for information, and they gave it; correct?

A. Under the monitoring and guidance of our legal people, as far as we are concerned.

• • • • •

[4253] Q. Now this is with respect to the monitoring of price protection as you have testified to it, Mr. McCaskill.

I direct your attention to the second page of that exhibit and there is a little buck slip, note, there. I [4254] think it is stapled to the back.

A. O.K.

Q. That is in Mr. Meyer's handwriting, is it not?

A. Right.

Q. And that says, "Bob."

And that Bob is Sikes, isn't it?

A. Probably.

Q. It says, "Please check with Ken. Advise Mole."

Does he not?

A. Yes, sir, that is what he says.

• • • • •

[4262] Q. That states, does it not, and it is dated February 7, 1966, directed to Mr. Meyer?

A. That's right.

Q. "Next time you talk with Jim Hague," and he is with Kaiser, right?

A. He is.

Q. "Check Roos Moor Leisure World job protection through March 31. I do not want to meet this, only to know if this is so."

Did you write that?

A. I did.

Q. Is that price verification, Mr. McCaskill?

A. I guess it is price verification. It is job price [4263] protection verification.

• • • • •

[4276] Q. Mr. McCaskill, do you know what "Two percent 20th prox net 2nd 10th prox" means?

A. The cash discount is a discount that you earn by performance. That is, if you pay your bill prior to those dates, as stipulated, you earn the two percent discount. If you don't pay it prior to that, two percent—what does it say?

Q. "Two percent 20th prox."

A. 20th prox means approximately the 20th of the month and, if you don't pay it by that time, you don't get the cash discount, but you have to pay it without the discount, as it stipulates.

Q. You have to pay the full amount if you don't do it by then?

A. Right.

Q. You don't get the discount?

A. That's right.

Q. And these were new terms and conditions of sale; were they not?

A. I believe they were.

• • • • •

[4286] Q. The entire time period, did you——

A. In the verification process, I am sure occasionally [4287] the credit situation was involved.

• • • • •

[4321] The COURT. I want you to tell me why in the world you put in a bill of particulars a statement saying Mr. Watt said that, when it was directly—when it is not what was said in the Grand Jury.

Mr. FRICANO. That was a mistake. That was a mistake—a mistake in a 260-page document, covering Grand Jury testimony of over 6,000 pages. Perhaps it is illustrative, at this point, Your Honor, that that is apparently, up to this point, the only mistake that they have pointed to in that bill of particulars, because we haven't had this since we have been in trial, now, for over a month.

• • • • •

[4328] The COURT. I have to say that was the sloppiest section. That section of the bill of particulars was sloppy. The language "invited him to join the conspiracy," I don't know what it means.

Mr. FRICANO. Your Honor, when I make a mistake, I will tell you right out.

The COURT. That was a honey.

When I say it was a honey, I thought that particular section of the bill of particulars, I thought was badly done.

Mr. FRICANO. I agree, sir.

The COURT. I frankly don't know what that means, invited him to join the conspiracy.

• • • • •

[4329] The COURT. One of the things that frankly surprised me, I am not sure Mr. Watt's statement was important. Every-

body says it was pretty important. I can't, myself, see how a statement you are going to be asked some questions, be honest, is really an invitation to join in [4330] anything or how it is very important, but I am not trying the case.

Mr. FRICANO. Your Honor, that is correct. It is for the jury to weigh that evidence in which ever way it wishes to. It may conclude, like Your Honor has, that it is not of that magnitude. On the other hand, it may not.

The COURT. If that would turn out to be the only evidence linking Mr. Watt to this alleged conspiracy, he would not be in this conspiracy, as far as I am concerned. I don't think it is that important.

• • • • •

[4332] Mr. FRICANO. We may get a simple representation here. Maybe Mr. McSweeney, in his attempt to talk to Mr. Simpson, was given the task of reporting that to all counsel.

[4333] The COURT. Well, ask Mr. McSweeney. Were you or any of your associates told by Mr. Simpson after Mr. Heibert, Herbert, or whatever his name is, pled guilty, that he would not talk to you?

Mr. MCSWEENEY. The lawyer told us that.

The COURT. He did tell you?

Mr. MCSWEENEY. Yes.

Mr. FRICANO. There you are, Judge.

Mr. BARTLIT. Your Honor,——

Mr. MCSWEENEY. Your Honor will recall that we had a connection with them. You remember the testimony about Celotex's investment in the company and the buy-sell agreements with them. It was particularly when Mr. Herbert was in the case. We called his lawyer. I thought he was going to talk to us.

I can't recall the details, because soemone in my office did it. Then, at any rate, later, he said no, he wouldn't; we couldn't interview the Simpsons.

• • • • •

[4365] DIRECT EXAMINATION (Continued)

By Mr. FRICANO:

Q. For perspective, Mr. McCaskill, immediately prior to yesterday's recess, we were going through the credit change on March 1, 1966. Do you recall that?

A. Yes, sir.

Q. And I had put on the board—or not on the board, on the easel—the March 1, 1966, change. Do you see that?

A. Yes, sir.

Q. Now, I want to get back into that and finish, go right straight through credit, the credit aspects of this case.

Before I do that, though, I want to ask you two or three brief questions relative to the later years.

Now, subsequent to December 27, 1968, after questions for clarification. All right. Now, you left your job as vice president of the Bestwall Division of Georgia-Pacific in June of '69. Is that correct?

[4366] A. That is right.

Q. Now, who took over from you?

A. No one, in effect. My responsibilities were assumed primarily by Mr. Burch, but, in title, he did not assume——

Q. He had a different title than yours?

A. Yes.

Q. All right. Now, Mr. Burch was one of the men, was he not, who was authorized by you and others to engage in this exchange of price information. Correct?

A. I don't recall. I don't believe that he was. You mean prior to that time, I believe.

Q. Well, what I am trying to get at is when you left the division.

A. Yes.

Q. When he took over, did the practice of exchanging pricing information continue?

A. I don't believe that it did, but, when I left, sir, I left the vicinity, also. I moved away from Portland, so——

The Court. How would you expect he would know that, Mr. Fricano?

Mr. Fricano. I am trying to ask the question very awkwardly, Your Honor. Let me rephrase it.

[4367] By Mr. Fricano:

Q. As of the time you did leave it was still going on, was it not, at the time you left?

A. If it was, it was instigated by others. I don't think that Georgia-Pacific carried on any on their own initiative.

The Court. When?

The Witness. Sir?

The Court. When? He wants to know just prior to your leaving were you still verifying prices.

The Witness. I would have to say if the verification process was taking place, it was on the initiative of others. I don't believe—I don't recall and I don't believe that Georgia-Pacific under my jurisdiction during 1968 or 9 was carrying on any, initiated any verification.

By Mr. Fricano:

Q. Mr. McCaskill, I don't want to argue with you, sir, but I have asked you this question several times, between 1962 to June, 1969, when you left, was this practice going on, and you said twice on direct examination——

The Court. Why did you ask him again, if he answered it?

Mr. Fricano. Because I want to get the transition between him and Burch.

[4368] The Court. Now you have gotten a different answer, so there we are.

Go ahead.

By Mr. Fricano:

Q. Do you recall that earlier testimony, sir?

A. What earlier testimony, sir?

Q. When I asked you whether or not the practice of exchanging prices continued throughout your participation at Bestwall and at Georgia-Pacific from 1962 to June, 1969.

Mr. Mellott. If the Court please, I object to the form of the question. The time periods are different. I suggest there has been no inconsistency in the testimony.

The Court. I guess the jury will have to decide whether there is an inconsistency in the testimony.

The Witness. Should I respond?

The Court. Yes, go ahead.

The Witness. Well, first of all, Mr. Fricano, verification works both ways. I presume in even your definition.

By Mr. Fricano:

Q. Yes, sir.

A. Someone has to instigate it.

Q. Yes, sir.

A. Whatever my action was before, as far as the time [4369] frame was concerned, I wouldn't particularly want to modify it or change it. Neither would I want to modify my response to

the activity which took place in the time frame of 1968, I believe you said, 9.

Q. Right.

A. Just before I left.

• • • • •

[4377]

Mr. FRICANO.

Question. I am asking you, isn't that the fact, that you guarded against price erosion by billing at fictitiously published prices?

Answer. We were concerned this would trigger price erosion.

Question. That is my point.

Answer. Yes, sir.

By Mr. FRICANO:

Q. Anything else, Mr. McCascill, that you want me to read?

[4378] A. I don't say—I think that—since you have read it in total, there is a document which I referred to, made definite reference to an interpretation of it, what the question was all about, whereby Mr. Meyers sets forth the reason, the internal reason, as he issued this bulletin as to this practice.

Q. All right, sir. Now, with respect to the practice of not billing at list prices, didn't it also prevent other dealers who were not getting this lower price from finding it out?

A. Not necessarily. Dealers exchange information among themselves, as I understand it.

[4379] By Mr. FRICANO:

Q. Not necessarily. I guess you mean yes and no then?

A. Mr. Fricano, I can't let you put words in my mouth. I'd have to answer "not necessarily." Dealers exchange information among themselves.

Q. How do you know that, sir?

A. Well, I dealt with many of them. I have been told this. I know it for a fact.

Q. That they would tell each other that they were getting discounts notwithstanding the fact that the invoice didn't show the discount?

A. Yes.

Q. Then why go through this business to begin with?

A. You are asking me to speculate again, sir.

Q. All right, sir. Isn't it a fact from time to time you gave a discount to one customer of yours and didn't give a discount to another customer of yours who competed in the same marketing area?

Mr. MELLOTT. I object to the form of the question unless the time frame is tied down.

Mr. FRICANO. Throughout the time period 1962 through June 1969.

The WITNESS. Should I answer it?

The COURT. Sure.

[4380] The WITNESS. Mr. Fricano, we have been through the process, I believe, of exploring discounts granted to customers of certain trade classification, including job price protection. The verification practice—if you will—in my understanding and under the guidance of our Legal Department, was set forth to establish as best we could the means to avoid violation of the Robinson-Patman Act.

If we gave a discount to a trade factor, if we gave a certain price concession, whether it be in the form of a discount or otherwise, to a certain trade factor, which was different from another trade factor in this same place of trade, it was based upon the process that our Legal Department had established for that purpose.

By Mr. FRICANO:

Q. So then——

A. And that meant that we were either in the process of meeting competition according to our best judgment, or we were making a business judgment without doing any kind of verification practice.

Q. All right. Then is it fair to say, sir, that the answer to my question is "yes" with that explanation that you just gave?

A. With the explanation that I just gave, my answer would be yes.

[4381] Q. Now, did these same lawyers tell you to put phony invoice prices on the invoices?

A. Phony?

Q. That's right. Fictitious. Unreal. False.

A. Fictitious? I dont' agree with that at all, sir.

Q. I didn't ask you if you agree.

A. I don't agree with that characterization.

Q. I didn't ask . . .

A. You asked me to answer.

Q. I ask you specifically: Were the list prices that were on the invoices not the actual prices? We won't characterize it any further than that.

The COURT. I think we will be better off not calling it anything. Just describe it.

• • • • •

[4403] Q. Now, Mr. McCaskill, would you turn to the last page of that document? You see the asterisk and the writing there?

A. Yes, sir.

Q. Was there a—a man by the name of Jay—J-A-Y—in Georgia-Pacific at this time, that you know of?

A. Yes, sir.

Q. Who?

A. His name won't come to me. If you will refresh me—I don't know.

[4404] By Mr. FRICANO:

Q. I don't know, sir. I am asking you a question.

A. This was a man named J. His name will come to me in a minute. Collins—I don't think that is right.

Q. The words there, in any event, under that asterisk say, do they not, "Verify this with Jay? Isn't that correct?

A. Yes, sir.

Mr. WARNKE. May I ask Your Honor, that Mr. Fricano read from the preceding page from under Roman numeral IX?

The WITNESS. Carroll, yes, J. F. Carroll, of course.

The COURT. Does that take care of what you wanted?

Mr. WARNKE. Yes.

By Mr. FRICANO:

Q. Is that the gentleman referred to here?

A. I presume so. It says J. Carroll.

Mr. FRICANO. If Your Honor please, Mr. Nicely's name is Jay, also.

Mr. WARNKE. I object. I ask that that be stricken.

Mr. FRICANO. If Your Honor please, the term is Jay, verify with Jay. The term "verify" is not [4405] one used by the United States.

Mr. WARNKE. I believe the definition of the term "verification" can be found in Webster's dictionary.

The COURT. I suppose that is correct, and if it needs a definition, I will give it.

Let me see what that says.

The WITNESS. I think I can help clear this up, if you will permit me.

The COURT. Yes, go ahead.

Mr. FRICANO. Sure.

The WITNESS. J. Carroll was employed by Mr. Fredericks and reported to him directly as the man who was in charge of this kind of thing, which was the clearing up of outstanding debts, old accounts, extension of credit, accounts such as Hollenbeck and Juell, which was really a problem. They were our exclusive account, I believe. And there is very little doubt in my mind the $4,500,000 volume that he is talking about, that he refers to through this asterisk, refers to J. Carroll.

By Mr. FRICANO:

Q. All right, sir.

Now you do know——

The COURT. In view of this, do you want to withdraw your motion to strike?

Mr. WARNKE. I do, Your Honor. [4406] It is clear.

Mr. FRICANO. I am not entirely satisfied, Your Honor.

The COURT. You can go ahead, but I asked if he wanted me to rule on his motion to strike and he said no.

By Mr. FRICANO:

Q. Do you know Mr. Nicely, the Defendant in this action?

A. Very, very casually, sir. I have seen Mr. Nicely maybe two or three times in my lifetime.

Q. Is his first name Jay, J-a-y?

A. I believe it is.

Q. Do you know whether or not Mr. Nicely also had under his responsibility at National Gypsum Company the responsibility for credit?

A. No, sir, I don't know that at all.

• • • • •

[4445] • • •

Well, do you remember, Mr. McCaskill, independent of any documents, unfortunately, that there was a price decrease that

was made effective by the industry as of May 15, 1967? Do you remember that?

A. No.

Q. A decrease now, not increase.

A. I presume again that you are talking about a published, not a discounted decrease?

Q. Not published.

A. Which was in effect all the time while this was going on?

Q. Published, yes, sir.

A. I don't recall specifically, no, sir.

Q. Okay, we won't put that one up on the board because you don't recall that.

• • • • •

[4477] Q. Just quickly, you talked with Mr. Hunt from week to week, but Mr. Hunt didn't tell you whether or not he had meetings or telephone conversations with Mr. Morgan of United States Gypsum, is that right?

A. No, sir, That's right.

Q. Well, did it ever come to your attention, Mr. McCaskill, that in point of fact Mr. Hunt was talking to Mr. Morgan about the May 1, 1969 price increase, and didn't you evidence great surprise by it?

Mr. MELLOTT. If the Court please, I object to that form of the question. There is no foundation for that.

The COURT. Well, it is just a question, and I have told the jury it is not evidence. I am sure they know it.

• • • • •

[4479] Q. All right, I will ask it, I will try to break it down for you, Mr. McCaskill.

Did it ever come to your attention, sir, that Mr. Hunt was talking to Mr. Morgan about the price increase United States Gypsum announced in January to become effective May, 1969?

The COURT. When? When are you asking him about? Before the announcement date or after?

Mr. FRICANO. I am sorry. Before the announcement date.

By Mr. FRICANO:

Q. Before the announcement date.

A. I believe you prefaced the substance of your question, "Did it ever occur to me?"

Q. No, no. Did you ever find out about it?

A. No, sir, I did not. I had no inkling. It never occurred to me, and I didn't know anything about such.

Mr. FRICANO. May the witness have 1163.

By Mr. FRICANO:

Q. Mr. McCaskill, can you identify 1163?

A. Yes, sir.

Q. What is it?

A. We have seen this before, Mr. Fricano, you and I.

[4480] Q. I thought you'd remember it, sir.

A. Yes, sir. This is a February 4 memo from me to Mr. Hunt. February 4, 1969 memo from me to Mr. Hunt.

Q. And the attachment?

A. Under the subject "Gypsum Pricing." It is a memo from W. H. Hunt to me and his typewritten remarks, which habitually his secretary tried to—Well, she did transcribe from his writing.

Mr. FRICANO. All right. I offer the exhibit.

Mr. MELLOTT. No objection, Your Honor.

The COURT. All right, it is admitted.

[Government Exhibit No. 1163 was received in evidence.]

By Mr. FRICANO:

Q. Now, Mr. McCaskill, the document dated February 4, 1969 from you to Mr. Hunt states as follows; does it not?

The COURT. You just read it. He doesn't have to tell you whether it states that. Just read it to the jury.

Mr. FRICANO. This document states:

> Hallelujah—you were right, Bill. It's always [4481] darkest before the dawn; but sun-up is not till May 1st, damnit.
>
> Nevertheless, U.S.G. has a trade announcement out to cover all areas with an increase approximating $5.00 per thousand and 2% terms.
>
> Our intent is to follow as fast as we can assimilate, print, and mail.
>
> They are taking the tack of not mentioning trade or competitive discounts and simply raising the list.

I think it is in our best interests to follow precisely along the same line, and no doubt so will everyone else.

A sample of their announcement is attached.

By Mr. FRICANO:

Q. Now, Mr. McCaskill, I will ask you again: Did it not come to your attention prior to the announcement by United States Gypsum of its price announcement to be effective May 1, 1969, that Mr. Hunt was in contact with Mr. Morgan on this matter?

A. No, sir, it did not come to my attention.

• • • • •

[4482] Q. All right.

Now, in the first paragraph you say,

Hallelujah—you were right, Bill.

What was he right about?

A. Mr. Hunt to me was a Dutch Uncle type of fellow. He was also a deeply religious man, devoutly so. He, no doubt—and I feel quite good about testifying in this regard, because you and I have been over this, it seems to me, two or three times before, sir. Mr. Hunt was the kind of fellow when I, as his subordinate, was a little blue or dejected because several of our plants probably were losing money—most of them, as a matter of fact—and when something happened like one of the prime competitors in the industry who publicly announced and published on January 31 that they were going to raise the price, he would express himself prior to that time, if I had no knowledge of it, and he had no knowledge of it, that "hang in there."

• • • • •

[4484] • • •

Q. And in the typed version of his handwriting it says:

Memo from W. H. Hunt to Mr. McCaskill. This is [4485] 816 constructive and I hope it will work. Too bad they waited so long, but I guess the guarantee prevented their doing otherwise.

Now, do you know what Mr. Hunt meant by that?

A. Well, first of all, "constructive" certainly means that price appreciation from our standpoint I would certainly consider constructive. And he was writing to me.

And, "too bad they waited so long," I think is self-explanatory. We had gone a long time in Georgia-Pacific without any profit—from the standpoint of gypsum products, I mean. When he said, "they waited so long," I am sure he had reference to U.S.G. Obviously a little old Georgia-Pacific plant, a plant against say 24 plants could not kick off a price increase with any kind of hope that it would be effective or help.

Then your further interpretation of "guarantee," I believe Mr. Hunt would probably mean, referred to job protection, because he was not familiar with the terminology, nor did he use it frequently in our business, end of the business.

• • • • •

[4505] Did you not testify at 5998,

Question. But your subordinates in 1969, in the persons of Mr. Meyer and Mr. Fatz, [4506] continued with the practice of price checking, didn't they?

Answer. In much less intensity.

Question. But the practice still continued, because you weren't told to stop; because if you had been told to stop, you would have stopped, wouldn't you?

Answer. Right.

Skipping down:

Question. Back to credit, Mr. McCaskill. I again show you Grand Jury exhibit No. 110-A, which is the Frederick's report——

I am sorry. That is a different subject matter. I read too far.

Was that not your testimony at this time, sir?

A. If it is on the record, that was my testimony, sir.

Q. So it is a fact, is it not, that Mr. Fatz was in contact with his competitors in 1969?

A. If they called him, yes, sir.

Mr. MELLOTT. I would request that the immediately prior question and answer be read on 5998, Your Honor.

The COURT. Read it.

Mr. FRICANO. Well, you would recall—[4507] perhaps for continuity we will have to go back a little farther.

Mr. MELLOTT. I think if you read the question and answer, it will be clear.

Mr. FRICANO.

Question. Well you would recall it, if he did it, wouldn't you; something of this magnitude?

By this time in——

Mr. MELLOTT.

Answer. By this time in 1969, right?

I would like to have it differentiated between the question and answer, Your Honor.

The COURT. You did, didn't you?

Mr. FRICANO.

By this time in 1969, Mr. Fricano, the credibility of our exchange of information on the telephone had been carried on as common practice prior to this time; and it was no longer reliable, because, as I say, the organization had changed, the sales force had moved into the distribution division, the goods were moving through the warehouses. I had no control over what their warehouses sold the goods for out of their stock or resold it from—resold it for when it was sold from the mill. So consequently, the concern over the violation of the Robinson-Patman Act, as far as the [4508] Gypsum Division was concerned, was considerably abated by this time in 1969.

• • • • •

[4510] Q. What I mean to say is, sir, that, when I asked you the question in front of the Grand Jury, about Mr. Meyer and Mr. Fatz continuing "with the practice of price checking, didn't they," you said, "In much less intensity." You didn't say only with respect to calls coming in.

A. I didn't say only with respect, at that time, I didn't. No, sir. I certainly didn't, I don't believe.

• • • • •

[4563] • • •

[Government Exhibit No. 1798 was received in evidence.]

By Mr. FRICANO:

Q. Now, that it is in your handwriting and it has got your doodles on it; doesn't it?

A. Yes, sir.

Q. And at the top of the page the name "Ogden White" appears; does it not?

A. Yes, it does.

Q. Who is Ogden White?

A. The Ogden White that I knew was an official in the sales department with what we knew as Pabco. I think it is Fibreboard Paper Products Corporation.

Q. One of your competitors; correct?

A. Yes, sir.

Q. And doesn't this note of yours show, indicate, a telephone conversation between you and Mr. White at which time you discussed a giveaway program of 16 extra pieces of board products per car?

A. I can't answer that yes or no, sir. I will interpret, if you will permit me.

[4564] Q. Would you please, sir.

A. First of all, there is no date on this.

Secondly——

The COURT. Just answer the question and leave your counsel do the legal end of this.

The WITNESS. Oh, all right, sir.

You asked me whether this was a telephone conversation? I certainly can't answer that. This information could have come from the field.

By Mr. FRICANO.

Q. All right.

Now, Mr. McCaskill, you said that before. You better look at 1799, sir.

Mr. MELLOTT. I would point out, Your Honor, that I am not counsel for Mr. McCaskill.

The COURT. Let counsel who are trying the case handle the legal ramifications, and you just answer the questions.

The WITNESS. Yes, sir.

By Mr. FRICANO:

Q. Mr. McCaskill, you have answered many of my questions in that same fashion, that you can't tell if this is a telephone call or what it is, and it probably came from the field. Can you identify the next document, 1799?

[4565] Mr. MCSWEENEY. I object to that statement of counsel. I object as to the form of the question, Your Honor.

The COURT. Would you read it to me.

[Last question read.]

The COURT. All right, you can answer the question.

I have asked everybody not to make comments, and I——

Mr. FRICANO. I am sorry, Your Honor.

The COURT. The jury will ignore any implication that might come from any such comment by counsel.

• • • • •

[4566] Q. Now what does it say, Mr. McCaskill, in the right-hand corner?

A. It says, "White to K.A.M., foil board, Phoenix, Arizona."

Q. Now, Mr. McCaskill, can you tell us whether you had a telephone conversation with Mr. White?

A. I could have probably told you a whole lot better if I had had both of these documents at that time.

Mr. FRICANO. Your Honor, could I have an answer to my question?

The COURT. I asked you to answer the questions and not do that. Please don't do it.

The WITNESS. Yes, sir, Your Honor.

This is a result of a telephone conversation from White to me, sir.

By Mr. FRICANO:

Q. Would you tell the jury what those two documents mean, what the conversation was, what were you trying to do with Mr. White?

A. Mr. White, it appears, was inquiring on foilboard for Phoenix, Arizona. "B.W." I believe would mean Bestwall,—"are putting 16 extra pieces/car; have photo; no charge; may be dunnage but not so marked. Most arrived in good order and is being sold as first class material by dealer."

[4567] That is my interpretation of Mr. Meyer's note.

Q. Yes, sir.

A. Okay.

Q. And you told him that, based upon a telephone conversation with Mr. White; did you not?

A. I must have.

• • • • •

[4571] Mr. DELONE. Might I ask the date of the document be given?

Mr. FRICANO. It was given, Your Honor.

Mr. DELONE. I didn't hear it.

The COURT. Read it.

Mr. FRICANO. Does Mr. DeLone not have the document?

The COURT. Listen, you don't discipline the Court. Don't talk to me in that tone of voice. When I say something, do it. I said, read it.

Mr. FRICANO. I didn't hear you, Judge. Honestly, Your Honor, I did not.

[4572] The COURT. You have been doing that quite a bit this morning, and I want it stopped.

Mr. FRICANO. November 3, 1966.

The COURT. All right.

• • • • •

[4573] Q. Is this a verification?

A. Mr. White, I think we have already testified—Mr. White called to question—or verify. Yes, sir.

Q. So, when you have a conversation with your competitor concerning the elimination of a dunnage, what have you, that is a verification?

Mr. MELLOTT. If the Court please, I object to the form of that question. It is not consistent with the testimony of this witness.

The COURT. Well, he may ask the question.

You can answer it.

The WITNESS. Mr.—I will just stand on my previous answer. Mr. White called to verify if we were putting this ridiculous amount of board on the bottom of a—free, on the bottom of a car.

• • • • •

[4575] Q. • • • Now, do you know what 1804 is?

A. Well, I will take it one at a time, if you would like for me to, or respond as you wish.

Q. What is 1804, sir?

A. The top is a handwritten note that looks like "From Mole—W. Mole," to—I believe it is Al.

Q. Al Meyer?

A. It would be Al Meyer.

[4576] By Mr. FRICANO:

Q. Wait a minute now. It is not in evidence.

A. Excuse me.

Q. Attached to it is a picture, is it not?
A. Yes, it is a picture.
Mr. FRICANO. I offer the exhibit.
[Government Exhibite No. 1804 was received in evidence.]

By Mr. FRICANO:

Q. That states from Mr. Mole to Mr. Meyer—Mr. Meyer is Sikes' boss, is he not?
A. That is right.
Q. This was taken by George Seivert last Friday, November 11, 1966, at United Wholesale in Phoenix, and what was taken is a picture, wasn't it?
A. It is a picture.
Q. And it shows the very situation of a piece of foil under the lip, does it not?
A. I would have to say that that is probably what it portrays.
Q. Now, you have the information, you have got the picture. Did you or any of your subordinates call National Gypsum Company to straighten this thing out?
[4577] A. I don't know, sir. There is a note on the bottom which I am sure you are going to get to.
Q. Do you want to read the note?
A. Yes, sir. It says, "Talked to KA 11-21 and I will—"
Q. Check an answer.
A. "check an A", whatever that means.
Q. Answer?
A. Advise, answer, I don't know, sir.
Q. Who is KA?
A. Well, I was one KA, but this certainly wouldn't be me in this instance, I don't believe. It conceivably could be Ken Atwell.
Q. Of National Gypsum Company?
A. Conceivably.
Q. Is this a verification?
A. This would be the practice of verification, yes, sir.
Q. So that when you have the evidence like a picture or you have the evidence like an invoice, you still call your competitors, is that right?
A. There is no doubt that we called the competitors about this, Mr. Fricano.
I must comment that I couldn't discern from this whether this is foilboard or not.

[4578] Q. Well, between the representation of your district manager, Mr. Mole, who says it is, and the photograph which he took, which he sent to you, isn't that enough, and even with the handwriting? Did you see the handwriting next to the picture pointing to the extra sheet of foil?
A. Yes, sir, I saw.
Q. I ask you again, sir, when you have proof such as that, why do you call your competitors?
A. Why?
Q. That is right, why?
A. To ascertain if this was a price concession, I presume, in the form of an extra piece of board.
Q. Competitive practice, isn't it?
A. If this was true, it was a competitive practice, yes, sir.
Q. Did you want to eliminate it with National Gypsum? Is that why you made the call?
A. I can't answer it in that way. We certainly wanted to meet it, but not meet it fictitiously.
Q. Did you want to eliminate it?
A. I can't answer that, sir.
Q. Why not, sir?
A. Well, it was my job responsibility to obtain optimum return for our goods, my prime job responsibility.
Q. You didn't want to give products away, did you, [4579] sir?
A. Not necessarily.
Q. I suppose National Gypsum doesn't either, does it?
Mr. DELONE. I object. This witness couldn't know what National Gypsum was doing.
Mr. FRICANO. This witness knows everything that National Gypsum was doing.
Mr. DELONE. I ask that that be stricken.
The COURT. I ask the jury to disregard that.
I suppose the question was a perfectly obvious one.
Mr. DELONE. I suppose I should not have intervened. I apologize, Your Honor. It was obvious.

• • • • •

[4618] Q. I ask you directly, sir, Mr. McCaskill, if it is not the fact that the reason Mr. Snell was concerned with Materials Handling Committee and its committee meeting and that the

reason he wanted those reports changed was because it came to his attention that the Materials Handling Committee was involved in anticompetitive practices and agreements?

Mr. WARNKE. Objection, Your Honor.

The COURT. Sustained.

Mr. FRICANO. I have no further questions of this witness.

• • • • •

[CROSS-EXAMINATION]

[4646] Q. I direct your attention to that sentence I read, "With our instructions from Bill Hunt to run flat out, regardless of price, I don't see how I can resist any longer." Mr. McCaskill, isn't it a fact that you had such instructions from Bill Hunt, from time to time, during this period from May, 1965, until June, 1969, that you were in the Gypsum Division of Georgia-Pacific?

A. Yes, sir.

Q. And isn't that also essentially the same instruction and information that you and other officials of Bestwall were given by Mr. Pamplin and other officers of Georgia-Pacific at this meeting in Paoli or in Philadelphia, Pennsylvania, at or about the time of the acquisition of Bestwall?

A. Yes, sir.

Q. Now, Mr. McCaskill, do you recall that, in response to a question submitted to you by the Court, that was relayed by the Court from one of the jurors, you defined what was meant by you as to job price protection?

A. Yes, sir.

Mr. MELLOTT. Excuse me for a minute, Your Honor.

Your Honor, I hate to be repetitive, but, in order [4647] to set the context for our next series of questions, I would like to read the answer again.

I am reading from page 3995, Mr. Fricano.

> Well, job price protection would in my mind mean a commitment from a supplier, a manufacturer, such as Georgia-Pacific, either through a dealer, a conduit, or possibly directly to a subcontrator, or in some cases a general contractor, prime contractor, which in effect commits to him the price of the material to be used on that specific job, and in most cases

> for the life of the job, or, in otherwords, for the contract life of that job.

By Mr. MELLOTT:

Q. Do you recall that?

A. Yes, sir. I remember that.

Q. Now, Mr. McCaskill, did it sometimes happen, in your experience, during the period from May, 1965, to June, 1969, that customers would supply to you or to your subordinates false information regarding job price protection they were requesting or that they claimed they were obtaining from other suppliers?

Mr. FRICANO. Objection. It calls for hearsay and also for a conclusion, but principally hearsay.

Mr. MELLOTT. If your Honor—well——

The COURT. You can answer the question.

[4648] The WITNESS. I—we had many occasions what we believed, and later turned out to be—what we believed, at the time, and later turned out to be false information, because we duplicated or were duped on, would be the answer, on such maneuvers.

By Mr. MELLOTT:

Q. Now, you used the term "duplicated" in your answer. What do you mean by that?

A. Certain customers would procure price protection on a given contract job and from a given supplier, and then, as it turned out later, get the same job protected from another supplier.

Q. Well, now, let's take an example.

If a customer had a job that required a million feet of board, and he was asking for job price protection on a million feet of board from one supplier to protect his bid on that job—are you referring, in this duplication situation that you just mentioned, to a situation where the customer would request job price protection on more than a million board feet on that particular job from different customers—or from different suppliers?

A. Well, he could, yes, sir.

Q. And did that happen, from time to time?

A. My recollection is, from time to time, it did.

Q. Isn't it a fact, Mr. McCaskill, that the main [4649] reason why you and others at Georgia-Pacific engaged in the

verification of job price protection on a particular job with a competitor was to determine whether or not, in fact, that competitor had, in the past, advised its customer that it would protect that particular job?

A. That's right. Yes, sir. I believe that is correct.

[4650] By Mr. MELLOTT:

Q. Isn't it also a fact, Mr. McCaskill, that the verification calls of which you have any knowledge concerning job prices related to verification of commitments that had already been made or offered prior to the time that the verification call was made?

A. To the best recollection I have of the verification practice, job protection, that is right.

Q. So, when you use the term anticipatory in your direct testimony in referring to verification of job price protection, am I correct that you simply meant that the commitment for job price protection which had been made or offered in the past would protect against the anticipated price change?

Mr. FRICANO. Objection, unless the witness defines the word anticipatory as he himself used it, not the way Mr. Mellott is characterizing it.

Mr. MELLOTT. He can answer my question one way or the other. If I have used it the wrong way, he can certainly tell me.

The COURT. He can.

Remember, I told the jury this is a decision you have to make and the fact that this witness is being asked these questions doesn't mean that you have to accept that version of it.

• • • • •

[4676] The COURT. Read off the exhibit numbers, and we will admit them.

Mr. MELLOTT. All right, Your Honor.

The COURT. That is what I was trying [4677] to get done.

Mr. MELLOTT. Excuse me just a minute, Your Honor. I believe we have already offered 260 and 261.

Georgia-Pacific Exhibit Nos. 262 through 273, inclusive; 275 through 351, inclusive.

The COURT. 275 through—all right. Any objection to any of those?

Mr. FRICANO. I am hurried looking through them, Judge.

The COURT. Go ahead.

Mr. MELLOTT. If the Court please——

The COURT. Let him look through them, and then we will see.

Mr. MELLOTT. I don't want to indicate each of those are the weekly report. Some of them are the monthly reports.

Mr. FRICANO. With that stipulation by Mr. Mellott, I will have no objection.

The COURT. They are admitted.

[Georgia-Pacific Exhibits Nos. 262 through 273, inclusive, and Nos. 275 through 351, inclusive, were received in evidence.]

Mr. MELLOTT. I would still like to read [4678] selected portions from these documents, Your Honor.

The COURT. From each one of those documents?

Mr. MELLOTT. I don't know whether I have on each one.

The COURT. There are about 75 documents here.

Mr. MELLOTT. If Your Honor please——

The COURT. They are in evidence. You give them to the jury, and let the jury read them.

Go ahead, now. Move forward.

You will be permitted to argue whatever the contents are, and the jury will have an opportunity to read them.

Mr. MELLOTT. If Your Honor please, these documents run from the beginning of the year to the end of the year, and they describe the competitive activity in the field on a yearly——

The COURT. Right, and the jury will get to see them.

Mr. MELLOTT. This is an extremely important part of this case.

The COURT. I am making a different ruling than I make ordinarily. They can all go out with the jury, and we will give them to them during the recess, and they can read them.

[4679] Mr. MELLOTT. They can't read them during the recess, and, furthermore——

The COURT. They will have as long as they want to read them. Proceed, please.

Mr. MELLOTT. May I——

The COURT. I am not going to spend the time to read 75 documents.

Mr. MELLOTT. May I read——

The COURT. You can read five of them.

Mr. MELLOTT. Scattered throughout the year?

The COURT. Yes.

Mr. MELLOTT. Could I ask for a recess to pick the five to read? At least, give me a little bit of time.

The COURT. How long do you want to look—to go through them?

Mr. MELLOTT. I need at least five minutes, I believe, Your Honor.

The COURT. You go ahead, and we will just wait here for five minutes.

When the jury goes out for recess, take all those exhibits that Mr. Mellott has indicated, and take them with the jury, and they can examine them.

[4680] Mr. MELLOTT. Could I ask your Honor to let me read one during each month of 1968?

The COURT. Pick a couple from the beginning and a couple from the middle and a couple from the end.

Mr. MELLOTT. All right. I would like to read from Georgia-Pacific Exhibit 265. It is a weekly market letter.

The COURT. We know what they are. Just read from them.

• • • • •

[4689] By Mr. MELLOTT:

Q. Were those sheets actually pink in color?

A. They were. They were pink in color. They are list price, the list price of the pink sheet could have varied from the published price in the marketplace and then a discount on top of that.

Q. The last paragraph "Newsflash! Flintkote/Blue Diamond announced to customers in the West on July 15 new prices effective August 1. We do not have all of the figures but in Southern California their price is $39.50 less 5 percent cash discount. This is the same as Kaiser's latest price in that area."

Mr. MELLOTT. Georgia-Pacific Exhibit 316.

The COURT. You'd better make this—this better be October or November and the next one December, because that is it.

Mr. MELLOTT. Your Honor, it is dated October 25, 1968.

The COURT. Fine.

You anticipated me.

• • • • •

[4696] • • • • •

[Georgia-Pacific Exhibit 318, dated November 8, 1968.]

The COURT. That is the last one, Mr. Mellott.

Mr. MELLOTT. The one for December is not quite as long, Your Honor.

The COURT. I don't care. Read one and that is it. As soon as you read it, we are going to have a recess.

Mr. MELLOTT. It is my understanding all these documents are in evidence and can be read by the jury in their entirety.

The COURT. They can be read in their entirety. I don't imagine they will be able to do it now, but at the end of the case, when the case is submitted to the jury, they will have an opportunity to read it.

• • • • •

[4728] • • •

By Mr. MELLOT:

Q. Mr. McCaskill, would you look at the document which has been marked for identification purposes as Georgia-Pacific Exhibit 381.

[4720] A. I have it, sir.

Q. Do you recognize that document?

A. Yes, sir.

Q. Would you tell me, please, what it is?

A. It is a June 17, 1968 memo from Mr. Hunt, my superior, to me, under the subject "Gypsum Division versus Gypsum Industry, April."

Mr. MELLOTT. If Your Honor please, I offer that document identified as Georgia-Pacific Exhibit 381 into evidence.

Mr. FRICANO. May I read it just quickly, Your Honor.

The COURT. Sure.

Mr. FRICANO. No objection, Your Honor.

The COURT. It is admitted.

[Defendant Georgia-Pacific Exhibit No. 381 was received in evidence.]

Mr. MELLOTT. If the Court please, I would like to read this document to the jury.

Mr. FRICANO. If Your Honor please, if Mr. Mellott intends—I would request if he doesn't intend to read the entire document, I would request that he . . .

Mr. MELLOTT. I intend to read the [4730] entire document.

The COURT. Go ahead, read the whole document.

Mr. MELLOTT. Letter from Mr. W. H. Hunt to Mr. K. A. McCaskill, dated June 17, 1968 entitled "Gypsum Division versus Gypsum Industry, April."

In analyzing the April comparative report • • •

By Mr. Mellott:

Q. Now, Mr. McCaskill, the documents that you have just previously identified, Georgia-Pacific exhibits 356 through 367, are those the types of comparative reports that Mr. Hunt was referring to?

A. Yes, sir.

Q. And in fact he was referring to the one for April, 1968; isn't that correct?

A. Yes, sir.

The COURT. Read the whole letter before you ask questions like that, because it interferes with the smooth flow of the document.

Mr. MELLOTT. I am sorry, Your Honor, I will try to remember to do that.

In analyzing the April comparative reports I noticed that we did 15.1% of the industry on wallboard compared to 17.5% a year ago. For the whole year 1968 we did 16.6%, but for the year to date this [4731] year it is 16.3% which, of course, was accentuated downward by the poor month of April. This pretty much ties in to the thing about which we have been talking recently.

I know that our activity in this field has caused our competitors to take other means of getting back some of the business we originally took away from them. We don't want this to happen. We are now geared to do this volume and want to continue not only holding our own, but moving ahead. I know you do not disagree with this.

The main thing is to not let them get too much of our business, even if we have to take drastic steps to hang onto it. I hope that when the May figures come out we shall have gained a little more in position.

If there is anything in the way of policy that you would like to do which you feel you cannot do, let's talk about it. We want to run those plants just as full as we possibly can. It is true that our mill profits have been good. Of course, we have been running at pretty good capacity in most places. We know where the weak ones are, and I am sure you will take steps to get them all into high gear.

By Mr. MELLOTT:

[732] Q. Now, Mr. Hunt referred to the 15.1% for April Is that the percentage shown on the exhibit, Georgia-Pacific Exhibit 68, 15.1% for the month of April?

A. Yes, sir, right.

Q. Now, would you look next at Georgia-Pacific Exhibit 383. Do you recognize that document?

A. Yes, sir.

Q. Would you tell me, please, what it is?

A. It is an internal memo from me to Mr. Hunt dated June 20, 1968, under the subject "Gypsum Division versus Gypsum Industry, April."

Q. And is that your response to the earlier document that I have just read, Georgia-Pacific Exhibit 381?

A. Yes, sir, it is the same subject.

Mr. MELLOTT. I offer Georgia-Pacific Exhibit 383 into evidence, Your Honor.

Mr. FRICANO. I probably won't have an objection, but I would like to read it, Your Honor.

It is a rather voluminous document, Your Honor. I am not going to object. I won't take the time now to read it over.

The COURT. All right, it is admitted.

[Defendant Georgia-Pacific Exhibit No. 383 was received in evidence.]

[4733] Mr. MELLOTT. If the Court please, I would like to read some parts of this to the jury.

Mr. FRICANO. As long as the second and third paragraphs are read on the first page. That's what I ask for.

Mr. MELLOTT. That's fine with me.

Document identified as Georgia-Pacific Exhibit 383 dated June 20, 1968, Mr. McCaskill to Mr. Hunt. Subject: "Gypsum Division versus Gypsum Industry for April.

We are taking some drastic, but, I think, sound steps of various kinds to sustain our momentum. A few of the methods are shown on the attached, and I am in full accord with running the plants full, so will do everything that can be thought of to do so on a sustained basis.

It requires some rather subtle methods to continually generate more volume when so much of our volume, 74%, goes directly into the marketplace to dealers. Every move of ours is more often than not magnified by the multiple reaction of competition, then used as justification, or whatever you call it, and spreads way beyond the spot where it started.

With the standard now 1.5 billion feet, each dollar price loss costs us 1.5 million dollars, and [4734] it usually drops off in 5% increments or two dollars.

This worries me, as you know, and the best way to cope with it, as I have pointed out before, is to move more and more through branch stocks. For when this happens, our moves into the marketplace on direct shipments are much better disguised and more difficult for the competition to ascertain, mostly because of the branch, with the expanded involvement as well as back-up stocks, becomes more adept at capitalizing on his basic advantage, thus a more skillfull chiseler.

Our men who help them sell it also gain in this expertise. One of the best examples of this is indicated on the attached exhibits. The one marked 'D, Operation Hot Summer, for the Atlanta and Albany, Georgia branches, both stock and both sell a good amount of their volume directly as well as through the warehouse. In other words, one method supports the other. And when they feed on each other this way the volume increasingly moves with less likelihood of adverse market price effect. This has been generally the case everywhere except California, which has been a world of its own. Stocking is almost our only answer there, however.

By Mr. MELLOTT:

[4735] Q. Now, Mr. McCaskill, I refer you to the Exhibits or the attachments to this first 2-page memorandum from you to Mr. Hunt, which I have identified as Georgia-Pacific 383.

Could you just summarize for me what those appendices relate to and the reason why you included them as attachments to your letter to Mr. Hunt?

A. Well, these were to illustrate to Mr. Hunt, in response to his nudge to me, about the industry position loss in April, that some positive steps were being taken. And they are illustrative of internal incentive programs in every case, I believe, except possibly Ryans. And I don't recall what this is, but basically they were designed to motivate the distribution division to sell more wallboard, hopefully through their stocks.

Q. Were these efforts—Did these in fact then represent efforts on your behalf to try to increase the market share which Georgia-Pacific had in the marketplace in gypsum wallboard?

A. Yes, sir.

Q. And was this in response to Mr. Hunt's direction to you to take drastic steps if you needed to do so?

A. Yes, sir.

Q. Would you now look at Georgia-Pacific Exhibit 385.

A. I have it here, sir.

[4736] Q. Do you recognize that document, Mr. McCaskill?

A. Yes, sir.

It is a memo from Mr. Hunt to me dated June 17, 1968 under the subject "Gypsum Division versus Gypsum Industry, April."

Q. Mr. McCaskill, would you also keep in front of you Georgia-Pacific Exhibit 383.

A. Okay.

Q. Now, you note that the date of Georgia-Pacific 383, parts of which I have just read to the jury, is June 20, 1968; is that correct?

A. Yes, sir.

Q. Would you just read to yourself the first sentence of Georgia-Pacific Exhibit 385.

A. Yes, sir.

Q. Do you believe there is a mistake in the date of the Georgia-Pacific Exhibit 385?

Mr. FRICANO. I object to that. What he believes is not important. It is what he knows.

Mr. MELLOTT. I will let the jury make that determination.

The COURT. Ask him whether there is a mistake, not whether he believes there is a mistake.

By Mr. MELLOTT:

Q. Is there a mistake, Mr. McCaskill?

[4737] A. An obvious mistake, yes, sir.

Q. And what should the date be on Georgia-Pacific Exhibit 385?

A. June 27—Later than June 20th, certainly.

Q. All right, sir.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 385.

Mr. FRICANO. I would like—so I won't have to keep making a continuing objection to documents of this type and character, not on grounds of competency, but on grounds of relevancy and materiality.

The COURT. All right.

Go ahead.

[4738] Q. Mr. McCaskill, is Georgia-Pacific Exhibit 385, the response of Mr. Hunt to you, in response to your memo identified as Georgia-Pacific Exhibit 383?

A. Yes, sir.

Q. The one which I just previously read to the jury?

A. Yes, sir.

Mr. MELLOTT. I would now like to read this document to the jury, Your Honor.

The date actually typed on the document is June 17, 1968, to Mr. McCaskill from Mr. Hunt, entitled "Gypsum Division versus Gypsum Industry, April."

> Thanks for your letter of June 20. This covered the subject quite completely, and it is interesting to note some of the things which are being done to increase our sales. Price reduction is a thing which no one likes. This is particularly true when the total volume is so large, as you pointed out. However, the most important thing is to run the plants full.
>
> I had a talk about this with Glenn the other day. No doubt he and you are working together to see just what we can do to insure this type of action. We have plenty of distribution and sales people to do the job and, if we are competitive, while at the same time being sufficiently aggressive, [4739] which I know we are, then our market penetration should again start on its way upward, whereas, in recent months, it has been going in the other direction.
>
> We must certainly be alert to getting as much money as we can, but we can lose more by not operating the plants full than we can make by holding out too long in face of a competitive situation about which we can do nothing.
>
> Another thing is momentum. We want to establish and keep a high sales in production momentum as a means of at least a partial protection in times of real adversity.
>
> This is all old music to you, I know, but I do want to again impress everyone with the importance of running those mills around the clock, mindful of the fact that, in so doing, we cannot expect to get any more money than will be allowed by our competitors.

By Mr. MELLOTT:

Q. Mr. McCaskill, there is a reference in that document—well, this sentence appears: "I had a talk about this with Glenn the other day."

Do you know who—the person to whom Mr. Hunt was referring?

A. Glenn Wilson received a copy, Mr. G. E. Wilson, who [4740] was the vice president of production.

Q. And what was—well, vice president of production at Georgia-Pacific at this time; is that correct?

A. Well, the Gypsum Division; yes, sir.

Q. Mr. McCaskill, will you look at the chart, Georgia-Pacific Exhibit 68, and tell me what happened with reference to the market share of Georgia-Pacific from June, 1968, until July, 1968?

A. It moved, sir, favorably, in our favor.

Q. From 13.6 percent to 15.3 percent; is that correct?

A. Right.

Q. And, based on the square footage figures that we previously referred to, that would be approximately more than 14 million square feet of board; is that correct?

A. Yes, sir.

The Court. Is that how you sell board, by the square foot, not by the square yard?

The Witness. Yes, sir, it is by the square foot, thousands of square foot is used as the standard unit of measure.

The Court. I see. Thank you.

Mr. Mellott. Would you now show Mr. McCaskill Georgia-Pacific Exhibit 213, Mr. Grainer?

By Mr. Mellott:

Q. I believe I have shown you this document earlier. [4741] It has already been admitted in evidence. But doesn't that document again reflect the pressure that Mr. Hunt was putting on you all the time to run the plant full out, regardless of price?

A. Yes, sir. It is another illustration the Dutch uncle could get pretty tough.

Mr. Mellott. May the witness have Exhibits—Georgia-Pacific Exhibits 386 through 400, 402, and 407 to 410?

Would you look at all of those documents, Mr. McCaskill, please?

The Court. Are they all the same type of documents, Mr. Mellott?

Mr. Mellott. Yes, they are, Your Honor, and I don't intend to read from all of them, but there are a few of them——

The Court. What are they?

Mr. Mellott. Well, would you like me to indicate——

The Court. If they are all the same kind of document, I don't see why you shouldn't.

Do you have any objection to his indicating what they are?

Mr. Fricano. No, Judge, I don't have any objection.

[4742] The Court: All right. What are they?

Mr. Mellott. Well, if Your Honor please, these documents are documents reflecting various programs, promotion programs, and the various blitzes, as they called them, that they put into effect in 1968 in the marketplace in order to increase the business.

The Court. Do you have any objection to these documents?

Mr. Fricano. I will stipulate it.

The Court. All right. There we are. He will stipulate that, during the year 1968, they put on a very strong campaign to increase their share of the market.

Mr. Fricano. I will stipulate that.

The Court. All right.

Mr. Mellott. I offer in evidence, Your Honor, Georgia-Pacific Exhibits 386 through 400, 402, 407 through 410.

The Court. They are admitted.

[Georgia-Pacific Exhibits Nos. 386 through 400 inclusive, No. 402, and Nos. 407 through 410 inclusive were received in evidence.]

The Court. The jury will be able to examine them, but they will know that the Government has [4743] stipulated that this is true, so we won't have to go into them.

Mr. Mellott. Well, may I read from just a few of them, Your Honor?

The Court. Well, he stipulated to it.

Mr. Fricano. I will withdraw my stipulation if that's the case.

The Court. He stipulated. After that, we don't have to do it.

Mr. Mellott. All right. Well, they will be made available to the jury to read?

The Court. Yes, they will.

Mr. Mellott. Could I have just a minute, Your Honor?

The Court. They will be in your jury room tomorrow morning, when you get here, if you want to look at them, and then, of course, they will be available to you to examine at your will at the close of the trial.

Mr. Mellott. May the witness have——

Mr. Fricano. Excuse me. Do we know—there is some confusion here at my table.

Are 403 and 406 in evidence?

Mr. Mellott. No. I haven't gotten to those yet, Mr. Fricano.

The Court. No.

[4744] Mr. Mellott. The ones I read were 386 to 400, 402, and 407 through 410.

Mr. Fricano. Thank you.

The Court. All right. Go ahead.

[4745] Mr. Mellott. May the witness have Georgia-Pacific Exhibit 401?

The Witness. I have it, sir.

By Mr. Mellott.

Q. Do you recognize that document?

A. Yes, sir.

Q. Would you tell me, please, what it is?

A. It is internal memorandum, a copy of same, from Mr. Hunt to Mr. Wilson dated Julyy 15, 1968 under the subject Gypsum Profits for June.

Mr. MELLOTT. I offer that document, Georgia-Pacific Exhibit 401 into evidence.

Mr. FRICANO. I can't find it.

The COURT. You go look at Mr. Mellott's.

Mr. MELLOTT. You should have it.

Mr. FRICANO. I can't find it.

Have you got it now?

No objection. I mean, my continuing objection on relevancy and materiality.

The COURT. It is admitted.

[Georgia-Pacific Exhibit No. 401 was received in evidence.]

[4746] Mr. MELLOTT. I would like to read part of it, Your Honor.

It is a letter from Mr. W. H. Hunt to Mr. Glenn Wilson dated July 15, 1968.

> First of all, let me express appreciation for the time you have taken to give me such a complete analysis of the reasons for our sharp drop in profits. To tell you the truth, I am surprised that profits did not slide quicker. Prices have been erratic and, for several months now, our volume has not been up to where it should be. Harold, Alex and I have been into this in depth as have you and Alex. I think everyone understands that the fastest way we can lose profit is to run at less than full capacity. Your report is a graphic illustration of this very point, and our sales departments are going to do everything they know how to do to prevent recurrences of this nature in the future.

In that letter Mr. Hunt referred to Harold. Do you know who he is referring to?

A. Yes, sir, the same fellow who got a copy, H. E. Sand. Harold Sand was a vice president of Georgia-Pacific Distribution Division.

Q. Well, now, look at Georgia-Pacific Exhibit 403. Do you know what that document is, Mr. McCaskill?

[4747] A. Yes, sir. It is a memo from Mr. Pamplin to Mr. Hunt.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 403.

Mr. FRICANO. No objection.

The COURT. It is admitted.

[Georgia-Pacific Exhibit 403 was received in evidence.]

Mr. MELLOTT. I would like to read—and this is a short one—

Mr. Pamplin to Mr. Hunt, dated October 16, 1968, entitled "Gypsum Sales."

> I notice our sales of gypsum board are not coming up to our productive capacity and we are cutting back production. This is bad. If we cannot sell our production now, we certainly won't be able to do it this winter.
>
> I wish you would check into this.

By Mr. MELLOTT:

Q. Mr. McCaskill, who was Mr. R. B. Pamplin?

A. Mr. Pamplin was the president of Georgia- Pacific.

Q. And the date of the letter I just read was October 16, 1968, correct?

[4748] A. Yes, sir.

Q. Would you now look at Georgia-Pacific Exhibit 404.

Do you have it?

A. Yes sir, I have it.

Q. Do you recognize that document?

A. Yes, sir, I do.

Q. Would you tell me, please, what it is?

A. It is a memo from Mr. Hunt to me dated October 18, 1968.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 404.

Mr. FRICANO. No objection.

The COURT. It is admitted.

[Georgia-Pacific Exhibit No. 404 was received in evidence.]

Mr. MELLOTT. I would like to read some parts of this to the jury, Your Honor.

It is also dated October 18, 1968, from Mr. Hunt to Mr. McCaskill.

> Our sales are not keeping pace with production and this worries me because of the time of the year which is approaching. If we cannot sell more than we [4749] are producing now, I doubt very much that we would be able to run our plants full in the wintertime, despite the storage space which we have developed.
>
> The only thing that I can think of that is causing this is either our inability or our unwillingness to time our

petitive moves in a manner necessary to keep or improve our position in the market. We talked about this back in June, and I thought we were taking steps to correct it. These August figures do not reveal that we have made much progress in this regard. Therefore, I urge you and Harold to quickly and drastically take whatever steps steps are necessary to reverse this trend.

By Mr. MELLOTT:

Q. Now, Mr. McCaskill, do you recall receiving this letter, Georgia-Pacific Exhibit 404?

A. I did, yes, sir. There is no doubt I got it.

Q. In reference to the fact that the market position is slipping again, looking at the chart, Georgia-Pacific Exhibit 68, do I see that from July, 1968 to August, 1968, and then into September, 1968 Georgia-Pacific's market position is dropping?

A. Yes, sir.

Q. And is that what Mr. Hunt is referring to in his letter which had been identified as Georgia-Pacific [4750] 404?

A. Yes, sir, obviously.

Q. Which he wrote on the same day he received the letter, Georgia-Pacific Exhibit 403 from Mr. Pamplin, is that correct?

A. He wrote—yes, sir.

Q. And since the early information in Georgia-Pacific Exhibit 404, the first paragraph that I read, is similar to the letter from Mr. Pamplin, identified as Georgia-Pacific 403, it is obvious, isn't it, that Mr. Hunt wrote his letter in response to Mr. Pamplin's letter to him?

A. Right.

Q. So that top management at Georgia-Pacific in 1968 was expressing grave concern that you take all types of drastic steps necessary to gain position in the marketplace, were they not?

A. They were.

Q. And they told you that as vice president in charge of sales of the gypsum division, and Harold Sand as vice president in charge of the distribution division, did they not?

A. Yes, sir.

Q. Would you now look please at Georgia-Pacific Exhibit 405.

A. I have it.

[4751] Q. Do you recognize that document?

A. Yes, sir.

Q. Would you tell me please, what it is?

A. It was a memo from me to Mr. Sand dated October 21, 1968.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 405.

Mr. FRICANO. No objection.

The COURT. It is admitted.

[Georgia-Pacific Exhibit 405 was received in evidence.]

Mr. MELLOTT. I would like to read it to the jury.

It is a letter dated October 21, 1968, three days after you received your letter from Mr. Hunt, Georgia-Pacific Exhibit 404.

Title: Gypsum Division versus Gypsum Industry.

Harold, Gene is going to review this with Ken but I thought it would be interesting for you to see also.

It reveals what we all have felt for past three or four months; we are steadily losing industry position from what we had gained over the past year or so.

[4752] By Mr. MELLOTT:

Q. Mr. McCaskill, who is the Gene you are referring to in that letter?

A. That would be Mr. Burch. He was shown on the bottom.

Q. And who is the Ken?

A. Ken would be Ken Gunther, who was Mr. Sand's man, who was a gypsum product manager for the distribution division.

Q. So you were having one of your subordinates have a discussion concerning the problem with one of Mr. Sand's subordinates, is that correct?

A. Yes, sir.

Q. Would you now look at Georgia-Pacific Exhibit 406, please.

A. I have it, sir.

Q. Can you identify that document?

A. Yes, sir. It is the memo from Mr. Hunt to Mr. Pamplin dated October 23, 1968.

Mr. MELLIOTT. I offer in evidence Georgia-Pacific Exhibit 406.

Mr. FRICANO. No objection.

The COURT. It is admitted.

[Georgia-Pacific Exhibit 406 was received in [4753] evidence.]

Mr. MELLOTT. I would like to read it to the jury, Your Honor.

Dated October 23, 1968, from Mr. W. H. Hunt to Mr. R. B. Pamplin. Subject: Gypsum Sales.

> There is no argument. We are not doing the job that should be done. As a matter of fact, this has worried me and I have been checking it ever since last June. Immediately, upon my return home last Friday, it was checked again. This was done since the August figures showed further retrogression in our sales as far as their relationship to the total market is concerned.
>
> The main reason for this retrogression is that we have been trying to get the high prices and our competitors have been outsmarting us, if that is what you want to call chiseling prices and methods of selling merchandise.
>
> We will keep working on this because it is mandatory to do a better job, as you have suggested in your note.

• • • • •

[4767] Q. Mr. McCaskill, you recall that, yesterday, we did introduce a lot of the types of documents His Honor just referred to with reference to 1968, relating to the competitive situation in the marketplace as to gypsum wallboard, and that I also reviewed with you, late yesterday, documents reflecting the attitude of Mr. Hunt and Mr. Pamplin, two of the top executive officers of Georgia-Pacific, in which they were advising you to take all drastic steps necessary to get as much of a market share as you could.

I would like to continue, at this point, with that latter subject.

Mr. MELLOTT. And, Mr. Grainer, would you hand the witness Georgia-Pacific Exhibit 404?

And I direct your attention to the third paragraph of that exhibit.

This exhibit has already been admitted, Your Honor.

The COURT. All right.

By Mr. MELLOTT:

Q. You notice, in the first sentence of that second paragraph—well, incidentally, this is a letter from Mr. Hunt to you; isn't that correct?

A. That is right. Yes, sir.

[4768–4769] Q. Dated October 18, 1968?

A. Right.

Q. There were some statements yesterday, made by counsel for the Government, about the fact that the variation didn't appear to be too much on this chart. Do you see that Mr. Hunt was very concerned about a change in the market share between 1967 and 1968? Is that correct?

A. Yes, sir.

Q. And what was the percentage change that he was concerned about?

A. Well, he starts off expressing concern about lath. Then he goes on to say the all-important item of wallboard went down from sixteen four to fifteen four.

Q. So one percent change in market share was of grave concern to him; was it not?

A. Yes, sir.

Q. And didn't he, as a result of that, urge you and Harold Sand, the vice president in charge of the Distribution Division, and I quote, "To quickly and drastically take whatever steps are necessary to reverse this trend"?

A. He did, indeed. Yes, sir.

Mr. MELLOTT. Would you now show Mr. McCaskill G–P Exhibit—Georgia-Pacific Exhibits 411 and 412, please?

The WITNESS. I have them, sir.

[4770] By Mr. MELLOTT:

Q. Mr. McCaskill, do you recognize the document that has been identified as Georgia-Pacific Exhibit 411?

A. Yes, sir.

Q. Would you tell me what it is?

A. It is a confidential internal bulletin from me to the Gypsum Division Field Regional and District Managers.

Q. And is this a document that you sent to the division regional and district managers following the statements made to you by Mr. Hunt and, in turn, by Mr. Pamplin to him? Is this one of the actions that you were taking in response to that?

A. Just let me look at this just a minute, sir.

Mr. MELLOTT. Incidentally, Your Honor, I offer this document in evidence.

Mr. THORSON. No objection.

The COURT. It is admitted.

[Defendant Georgia-Pacific Exhibit No. 411 was received in evidence.]

Mr. MELLOTT. If Your Honor please, a substantial portion of this I plan to read to the jury, and maybe I could do it while Mr. McCaskill is looking at it.

[4771] The WITNESS. I have read far enough to ascertain this is an action—I mean my memo is an action which is prompted, to a large extent, by Mr. Hunt's earlier memo to me.

Mr. MELLOTT. All right, sir.

This is a document from Mr. McCaskill. We have heard, to all Division Regional and District Managers entitled "Gypsum Pricing Policy" dated November 1, 1968, with a copy to Mr. H. E. Sand.

> Let's face it. The price increase did not come about, and it is unlikely now that it will until things get somewhat rougher in the marketplace.
>
> Since we did not raise our prices internally to the branches we really should not have lost momentum, but the fact is that we did. The big reason, however, is that competition for some reason suddenly started to slug simultaneously with the price increase announcement. Result: It has hurt our market penetration.
>
> I have, within the past two days, talked to each of you and outlined how we are to go about getting our sales back up to the level that we must have. Basically, it amounts to providing each of you with pricing authority to an extent that we act quickly to protect ourselves; and further, to get [4772] plus business flowing again—from two directions.
>
> Harold Sand has talked to each of his regional managers about gypsum sales problems, and his Portland staff is aggressively proceeding to establish some impetus toward the branch managers and branch salesmen totally accepting gypsum product sales responsibility. It is recognized that the gypsum specialist and/or former gypsum salesmen's efforts must be constantly augmented by the regular branch sales force.

> All of this adds up to two fundamental factors. First, and most important, we will unleash and sustain in earnest all the latent gypsum sales power of the distribution division.

I would like to read that part again.

> First, and most important, we will unleash and sustain in earnest all the latent gypsum sales power of the distribution division. This naturally will be pointed to the more profitable day-to-day small dealer volume where credit is no great problem and where our volume destiny lies to a great extent. Secondly, we have established the means to expand the use of your individual judgments toward developing and expanding volume sales to the trade factors who buy gypsum in substantial amounts; the skillful chiselers that we must deal with on a day-to-day [4773] basis for their favors.
>
> Both price and competition will no doubt suffer; however, we can only hope that the price will suffer to a minimum extent based upon that judgment factor which you will apply with discretion. But let all of us remember that the plant operating at adequate levels is our prime responsibility.

By Mr. MELLOTT:

Q. Mr. McCaskill, in that letter I have just read the second sentence I read was that the price increase did not come about. Do you know what price increase is referred to? Is that the September, 1968 increase that Mr. Fricano asked you about on direct?

A. It could have been. I am not sure, but it could have been. It is probably.

Mr. THORSON. Objection. Move to strike the speculative answer, Your Honor.

The COURT. All right.

Mr. MELLOTT. I will get into that later, Your Honor, with other documents.

By Mr. MELLOTT:

Q. Would you now look at Georgia-Pacific Exhibit 412, please?

A. I have it.

Q. Do you recognize this document?

[4774] A. Yes, sir.

Q. Would you tell me please what it is?

A. It is dated October 31, 1968. It is a bulletin from Mr. Fatz, the staff man on my staff, to the Gypsum Field Managers, copies to appropriate people, under the subject "Pricing Authority—Gypsum Board Machine Products."

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 412, Your Honor.

Mr. THORSON. No objection.

The COURT. It is admitted.

[Defendant Georgia-Pacific Exhibit No. 412 was received in evidence.]

Mr. MELLOTT. I would like to read just a small portion of this, Your Honor.

By Mr. MELLOTT:

Q. Before I do that, can you tell me, please, to whom this document was sent by Mr. Fatz?

A. It was sent to the Gypsum Division Management people, the survivors, really, the only ones still left in the Gypsum Division who were in the field at this time.

Mr. MELLOTT. It is dated October 31, 1968.

In A. L. Meyer's absence, Alec has asked me to [4775] provide each of you with this procedure:

Effective with shipments made on or after November 4, 1968, you are hereby authorized to meet competitive situations or to deviate from pink sheet prices in order to obtain blocks of business. This authorization will allow you to deviate up to a maximum of $2.00 on one-half inch and five-eighths inch board machine products and $1.50 on all other board machine products except those noted as follows. This authorization does not extend to gypsum sheathing, foil back, and Eternawall products.

You should be in daily communication with the plant or plants to which you have a sales responsibility; and when a plant needs orders to sustain optimum production, you should use this authorization to obtain blocks of orders for immediate shipment.

By Mr. MELLOTT.

Q. Mr. McCaskill, directing your attention to Georgia-Pacific Exhibit 68, do you remember these last few documents I have referred to in October and November, 1968? What happened to the market share of Georgia-Pacific from the end of September until November, 1968?

A. September indicates 14.1. Excuse me. November, 15.7. It is a substantial increase.

Q. An increase of 1.6% of market share, is that [4776] right, sir?

A. Yes, sir.

Q. That would be based on the at least 7 million square feet of board per pecentage point, approximately 18 million square feet of wallboard that is represented by that difference in each month, isn't that correct?

A. At least that much, yes, sir.

[4777] Q. Is it fair to say, then, Mr. McCaskill, based on the documents which I have just shown you today and those which were shown to you yesterday or read yesterday to the jury or admitted in evidence, that, during 1968, Georgia-Pacific was doing all it could to gain and maintain its market share in a very competitive marketplace?

Mr. THORSON. Objection, Your Honor. It calls for speculation, conclusion, and whatever. "All it could" has such an indefinite meaning. I would object to the question.

The COURT. Well, we will let that be answered, and that will end this line of inquiry altogether.

Mr. MELLOTT. All right, Your Honor.

The WITNESS. It was a rough year, and we got in there and slugged. Yes, sir.

• • • • •

[4793] • • •

By Mr. MELLOTT:

Q. Now, Mr. McCaskill, referring you to exhibit G-P [4794] 50, that's this, the chart,——

A. Yes.

Q. ——which represents the distribution centers around the country in 1969, January 1, 1969, right at the beginning of the statutory period applicable to this proceeding.

Now, when we have been talking about sales being transferred to that Distribution Division, isn't it a fact that that

meant that each of the branch managers in each of these locations was selling gypsum wallboard along with all of the other building material products he was handling?

A. Oh, yes, sir. And his salesmen were at the same time.

Q. Did any other competitor of Georgia-Pacific, any other producer of gypsum wallboard, have a similar type of distribution system at that time?

A. No, sir. No, sir.

• • • • •

[4797] By Mr. MELLOTT:

Q. Isn't it a fact that each one of those branch managers in each one of those 102 centers had independent authority to set the price at which he sold the gypsum wallboard products?

A. He did. He had pricing autonomy, yes, sir.

Q. His sole responsibility was with reference to the profitable operation of his total branches, is that correct?

A. Overall total, yes, sir.

Q. He obviously was supposed to try to return a profit, is that correct?

A. That was his total responsibility, to turn an overall profit.

Q. But with that guideline he had independent authority to set the prices on the products he sold through that branch, including gypsum wallboard, isn't that correct?

A. That is correct.

Mr. THORSON. If Your Honor please, could we have a time period in respect to this testimony?

Mr. MELLOTT. I intended to be referring to the period between May 1, 1965 and June, 1969, when the branches started to make the sales of gypsum wallboard.

[4803] • • •

By Mr. MELLOTT:

Q. Now, Mr. McCaskill, did the Gypsum Division participate with the distribution division in setting up promotion to get the distribution division moving and to give them incentive toward the sales of gypsum board products?

A. Yes, sir.

Q. And we have introduced yesterday several documents that related to that matter.

[4804] Q. Now, did these blitzes or promotions frequently constitute special discounts that were given to the branches in order to give them more flexibility in obtaining sales in the marketplace?

A. Yes, sir. It says, right here, "Double incentive and special two and a half promotional allowance."

Q. This was an additional allowance; is that correct?

Mr. THORSON. Excuse me, if Your Honor please. I believe this document and these facts relate to the self same thing that was stipulated and agreed to yesterday, and there is no need to repeat, as cumulative, any of this testimony.

Mr. MELLOTT. If Your Honor please, yesterday, I was referring to the overall promotion program to promote the sale. The point here, on this particular document, shows the—this is a document supporting the testimony of Mr. McCaskill, which shows the pricing authority in the branches, the fact the Gypsum Division was giving additional discounts to the branch, that the branch could work with in the field; and the purpose, at this point, I am not going through——

The COURT. Let's do it quickly. We have gone into this at considerable length, so let's do this quickly, and then go to something else.

Mr. MELLOTT. I will move as fast as I [4805] can, Your Honor, but the witness was on the stand for four days on direct.

The COURT. Just don't argue with me. Just comply with my rulings, please.

Mr. MELLOTT. I am sorry, Your Honor.

By Mr. MELLOTT.

Q. Mr. McCaskill, would you please look at Georgia-Pacific Exhibit 390?

A. I have it.

Q. Would you tell me, please, what that document is?

A. This is the same as the last one we just had, a weekly teletype market report from a Gypsum Division man, who in this case, was in Brunswick, Georgia, the southeast region dated June 3, 1968.

Q. The report is dated June——

A. I am sorry.

Q. July 1, 1968.

A. Right. I stand corrected. It is dated 6/29/68.

Mr. THORSON. And, if Your Honor please, for the same reason, I object to repeatedly going through this document. It also was included in the group received en masse yesterday.

Mr. MELLOTT. If counsel for the Government will stipulate that the branch managers of Georgia-Pacific had independent pricing authority, I can get rid of a lot [4806] of these documents, Your Honor.

The COURT. Any question about that?

Mr. THORSON. If Your Honor please, we stipulated on the record, yesterday, what this document contained, on the representation by Mr. Mellott.

The COURT. Do you have any question in your mind about whether the distribution centers had individual pricing authority?

Mr. THORSON. Any question whether they had any individual pricing authority?

The COURT. Yes.

Mr. THORSON. Obviously, they did have some pricing authority.

The COURT. Will you so stipulate?

Mr. THORSON. Yes; but we will not stipulate they had total autonomy, Your Honor.

The COURT. Nobody is claiming they had total autonomy.

• • • • •

[4842] Q. Now, isn't it a fact, Mr. McCaskill, that, in January 1969, you were considering, at Georgia-Pacific—I mean you, personally, along with others—the need for a price increase on gypsum wallboard?

A. Yes, sir. This is an indication that this was certainly a part of what I was attempting to do at this time.

Q. And doesn't Georgia-Pacific Exhibit 215 represent a request from you to your subordinates or regions concerning a proposed pricing plan?

A. Yes, sir. After consultation with the Distribution Division people.

Q. All right, sir. I ask you to look at Georgia-Pacific Exhibit 216.

A. I have it.

Q. Mr. McCaskill, do you recognize that document?

A. Yes, sir.

Q. Would you tell me, please, what it is?

A. It is an internal memo or report from the field [4843] to Mr. Kaboose, who, at that time, was in Charlotte, North Carolina, to me, dated January 20, 1969.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 216.

Mr. THORSON. No objection, Your Honor.

The COURT. Admitted.

[Georgia-Pacific Exhibit No. 216 for identification was received in evidence.]

[4844] By Mr. MELLOTT:

Q. Mr. McCaskill, who was Mr. Kaboose?

A. Mr. Kaboose was the Gypsum Field man in the Mid-Atlantic Region headquartered in Charlotte.

Q. And is this a document written to you in response to your inquiry of January 16, 1969, identified as Georgia-Pacific Exhibit 215?

A. I believe it is, sir. I believe that's obvious.

Mr. MELLOTT. I would like to read just some parts of this, Your Honor. This is dated Janaury 20, 1969.

This is not something we cannot plan.

Incidentally, Your Honor, since I am going to try to limit what I read, would it be possible for these documents to be sent to the jury so that they can read the balance of it; because there are other relevant parts that I would normally read, but I am trying to keep it as short as I can.

The COURT. All right.

Tell Mr. Keene which ones you want and the jury will get them.

Mr. MELLOTT. All right. 215 and 216. I will identify the others as I go along.

> This is not something we cannot plan, but have to handle each situation as it presents itself. This [4845] almost leaves a price increase up to our competitors who, I am sure, must be in worse shape than we are. I don't see any possible way for us to be the spiritual leader in the price raising to the customers as long as they are presently still cutting the price where it isn't necessary.

May the witness see Georgia-Pacific 217, please.

The Witness. I have it.

By Mr. MELLOTT:

Q. Is this another response to your letter, Georgia-Pacific Exhibit 215?

A. Yes, sir, it would be. From Mr. Hartman in the northeast.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 217, and I would like this one also sent out to the jury, Your Honor.

The COURT. All right.

Mr. MELLOTT. I would like to read just a short amount from it.

Mr. THORSON. No objection, Your Honor.

The COURT. It is admitted.

[Defendant Georgia-Pacific Exhibit No. 217 was received in evidence.]

[4846] Mr. MELLOTT. "In line with your request and our discussion in Washington, I met with Frank Schleicher last week in an attempt to work out a plan by which we could bring our price sheets more in line with the market and also increase our prices 5% throughout the northeast region. We suggest three different price lists to be published with an effective date of March 1st, which would be workable in the respective area markets."

This is dated January 21, 1969.

By Mr. MELLOTT:

Q. Who was Mr. Schleicher?

A. Mr. Schleicher was the Gypsum—Excuse me. The Distribution Division Regional Manager for the Northeast, headquartered in Clifton, New Jersey.

Q. Would you look now please at Georgia-Pacific Exhibit 218.

A. I have it.

Q. Is this another response to your inquiry, Georgia-Pacific 215?

A. Yes, sir, it obviously is.

Mr. MELLOTT. I offer in evidence Georgia-Pacific Exhibit 218.

The COURT. It is admitted.

• • • • •

[4848] Mr. MELLOTT. I am reading from Georgia-Pacific Exhibit 219 dated January 20, 1969, from Mr. McCloud to Mr. McCaskill.

[4849] Alec.

I am opposed to trying to lead any industry price increases. We are still recovering from the effects of our efforts last fall, and I believe a repetition would jeopardize our market position.

I would think that the other majors are at a much more difficult position than we, and I think it is time we let someone else be the missionary. Even then I don't see how the market will accept a raise until we have a demand increase.

By Mr. MELLOTT:

Q. Mr. McCaskill, do you recall whether the effort last fall he is referring to was the September 16, 1968 effort of Georgia-Pacific?

A. Not specifically.

Q. Who was Mr. Roger Meyer?

A. Mr. Meyer was in the same location as Mr. McCloud, and he was a gypsum field man.

Q. Who was Mr. Goetze?

A. Mr. Goetze was a gypsum field man in Chicago for the Midwest Region.

Q. And Mr. W. D. Brooks?

A. The same for the Southwest, headquartered in Dallas.

Mr. MELLOTT. I would like to read just [4850] a small part from Georgia-Pacific Exhibit 222, Your Honor, which is dated January 23, 1969, from W. D. Brooks to Mr. McCaskill.

Georgia-Pacific should not lead in a price rise attempt in the Southwest. The climate is no better now for us to lead than it was last September when we did lead, with a detrimental effect of not only losing momentum which took months to regain, but prevented us from making the fourth quarter budget. We can see no reason why an announced price rise now would work any better in a seasonably slow period when it didn't last September, a seasonably high period of demand. Therefore, our recommendation is to continue the successful policies employed in the Southwest, following price changes, not leading.

• • • • •

[4859] The COURT: I would like the record also to show that we are making them available to the jury for a long enough period of time to enable them to read so much of it as they desire to read, and we will, again, make them available at the end of trial for as long as they want to read them.

• • • • •

[4861] Q. Now, Mr. McCaskill, does that document and the others that I have just read refresh your recollection as to whether the May 1, 1969 price increase held?

A. Yes, sir. It does.

Q. And did that price increase hold in the marketplace?

[4862] A. No, sir.

• • • • •

[4864] Mr. MELLOTT. May I show the witness these other documents that I didn't read from, to see if that refreshes his recollection, Your Honor?

The COURT. Do you know, Mr. McCaskill, whether or not the price in the market went up as a result of whatever occurred May 1, 1969?

The WITNESS. Yes, sir, I know that it didn't go up. The extent of it going down, I can't——

The COURT: Isn't that what you are trying to get at, Mr. Mellott?

Mr. MELLOTT. Could I have the answer read?

[Answer read.]

The WITNESS. Recall, I meant to say.

Mr. MELLOTT. All right, Your Honor.

I am trying to get through a good bit of this, Your Honor.

The COURT. All right.

By Mr. MELLOTT:

Q. Mr. McCaskill, yesterday and earlier today I have asked you questions concerning the severe competitive conditions in the marketplace on gypsum board products in 1968, and we have identified and offered in evidence documents relating to that. We would now like to show you similar documents with reference to 1969.

[4865] Mr. MELLOTT. Here, Your Honor, maybe I should identify all these documents again.

Mr. THORSON. If Your Honor please, we have just spent an hour and a half on 1969.

Mr. MELLOTT. The documents—sure, some of those relate to the competitive condition in the marketplace, but they were directed primarily to the May 1, 1969 price increase.

The COURT. You identify all the documents you want to put in concerning the market conditions in May, 1969.

Mr. MELLOTT. There are additional ones. They are Exhibits 447 through 460.

The COURT. You represent they are all documents referring to the market conditions?

Mr. MELLOTT. Yes, and Your Honor, these are mainly these weekly or monthly reports.

The COURT. They are admitted and they will be made available to the jury to read.

[Defendant Georgia-Pacific Exhibits 447 through 460 inclusive were received in evidence.]

Mr. MELLOTT. May I read some examples, Your Honor?

[4866] The COURT. Five.

Mr. THORSON. Could I ask first whether any of these examples, as Mr. Mellott says, relate to the period of time when Mr. McCaskill was in the Gypsum Division and, if not, they are clearly beyond the scope of any direct examination.

The COURT. Do they?

Mr. MELLOTT. If Your Honor please, I have been careful to keep them within the early period of 1969.

The COURT. When Mr. McCaskill was still there?

Mr. MELLOTT. I do not believe there is any that runs after May, 1969, Your Honor.

The COURT. All right.

Mr. MELLOTT. The last one, which is Georgia-Pacific Exhibit 460, is dated May 23, 1969.

The COURT. All right.

Mr. MELLOTT. It is my understanding these will be sent out with the jury.

The COURT. I have said that.

Mr. MELLOTT. All right, Your Honor.

Reading from Georgia-Pacific Exhibit 447 dated January 3, 1969, from Mr. T. R. Kenslea to Mr. McCaskill under the heading "Competitive Condition."

• • • • •

DISCUSSION

[4994] • • •

fourth one was filed. I mentioned it to Mr. Burr, and he advised me that Your Honor had suggested that we could discuss those matters, along with the other motions, today. But, in spite of the fact that all [4997] of these motions will be filed on the grounds that we have mentioned, and in spite of the fact that Your Honor had scheduled argument on the motion for mistrial today, the improper, prejudicial conduct of the prosecutor has continued. If anything, it has gained in intensity, and we believe that this whole matter, this whole approach to this case by the Commonwealth or—by the Commonwealth—by the Government——

The COURT. I have enough trouble without getting the Commonwealth in on this.

Mr. MELLOTT. I am sorry, Your Honor.

This whole approach by the Government is designed to prevent the Defendants from having a fair trial.

There are many, many instances in the record. I do not propose, this morning, to go into all of these, because we have itemized the significant ones in the brief which we filled with Your Honor yesterday, and I hope Your Honor has had an opportunity to read that brief, but I would like to mention——

The COURT. Let me state for the record that I have read that brief.

Mr. MELLOTT. All right, Your Honor, so I will not go into all these items in detail again, and——

The COURT. No. There is no reason to just read the brief to me.

[4998] Mr. MELLOTT. I understand that. So I would just like to mention some of what I consider to be the significant points.

One of the areas that troubles me the most in this case, as far as the Government's misconduct is concerned, is the constant and repetitious effort of the Government to suggest to the jury that there is evidence in this record which isn't here. This is done in the way in which the questions are asked, and one example that is discussed—it is in the brief, but one that I would like to cover here, because it is one that, as I said, troubles me so much.

It relates to the method in which the Government has been permitted and has used the calendars, Your Honor.

Your Honor, at an early stage in this proceeding, indicated that documents of this sort, and particularly calendars, could be

The COURT:

All right. Who is going to speak for the movants?

[4995] Mr. MELLOTT. I am, Your Honor.

The COURT. All right.

Mr. MELLOTT. Could I have just a second?

Mr. FRICANO. With the permission of the Court, while Mr. Mellott is getting himself together, Mr. Thorson will make the principal argument—the only argument on behalf of the Government.

The COURT. Off the record.

[Discussion was held off the record.]

The COURT. On the record.

Mr. THORSON. I won't do it, Your Honor, while Mr. Mellott is getting himself together.

Mr. MELLOTT. That may take a long time, Your Honor.

The COURT. Mr. Mellott, I am sure by now, you have noted from the transcript that there was no offer that Mr. Sikes was going to testify that the lawyer didn't know what was going on—that he didn't know what he was talking about. The testimony was the lawyer didn't know what was going on.

Mr. MELLOTT. I see that.

The COURT. Which has a different meaning.

Mr. MELLOTT. If Your Honor please, I [4996] think the effect was exactly the same.

The COURT. Well, I think that what was meant by the question, "didn't know what was going on," I think, by that, it meant that the lawyer did not know about questioning competition about prices and verifying them without keeping a written record of them.

I think that was the import of the question. If you feel differently, you can argue it.

Mr. MELLOTT. Well, I do feel differently.

The COURT. You will agree that the objection was "didn't know what he was talking about"?

Mr. MELLOTT. These are not the exact words. I submit that was the effect of what was said, in the context in which it was put and in the manner in which it was stated.

The COURT. All right.

Mr. MELLOTT. If the Court please, during the course of this trial, four mistrial motions were filed by the Defendants, based on various items of improper, prejudicial conduct of the prosecutors. We were prepared to file additional motions after the

utilized only—if they were simply put into evidence in the way in which the Government has been doing it, could be utilized only for the purpose of showing there were entries therein.

The COURT. Of course, the jury can draw from that inference whatever they want.

Mr. MELLOTT. That is exactly the point which I am making, or trying to make.

The Government, then, in subsequent questions—[4999] and this has been done time and time again—will ask the question, as he did of Mr. McCaskill, "Well, isn't it true, Mr. McCaskill, that—" and this is following a statement by Mr. McCaskill that he knew nothing about a meeting that took place in February, 1965, in Portland, Oregon, if it did take place, the record has not established, now, that it did.

The COURT. No, but all I am pointing out is the jury can infer it did from the facts that are there if they wish to.

Mr. MELLOTT. All right, but, in questioning Mr. McCaskill, after he has indicated in the record he knew nothing about the meeting, Government counsel says, "Well, aren't you aware that a meeting took place, a four-hour meeting, in Portland, Oregon, in February, 1965, attended by Mr. Hunt, Mr. John Brown of National, Mr. Gimlin of USG, at which their concern—your competitor's concern about the entry of Georgia-Pacific into the gypsum business was discussed?"

Your Honor, there is nothing in the record, not only to—there is no proper evidence in the record to support that a meeting took place, really, at which any gypsum items were discussed, let alone any proper evidence in the record that the purpose of the meeting was to discuss the concern of the competitors of Georgia-Pacific with [5000] reference to the competition that Georgia-Pacific would introduce into the industry.

Now, I submit, Your Honor, I know Your Honor has tried to avoid any prejudice from that by simply—by instructing the jury that the question is not evidence.

[5001] Mr. MELLOTT. You have done that on various occasions, and we appreciate that, but I respectfully submit, Your Honor, when this tactic is used time and time and time again by the Government, that while Your Honor does that, I do not believe that that will correct the error.

The COURT. Now I want to ask you a question about that.

In a simple negligence case, an automobile accident, the plaintiff takes the stand, would you say the defendant could not say to him, "Did you not go through a red light just prior to the collision?" unless there was other evidence that he did go through the red light?

Mr. MELLOTT. If Your Honor please, the point I make——

The COURT. Answer that question first.

Mr. MELLOTT. If you have a defendant that was at the scene of the crime, or at the scene of the accident, and you have established that, I think you can ask that question.

The COURT. Now the witness says, "I didn't see the defendant prior to the collision."

Does that make it a basis for mistrial that such a question was asked?

[5002] Mr. MELLOTT. Your Honor——

The COURT. That is where I am now, so let's answer that.

Mr. MELLOTT. If he says I didn't see?

The COURT. Yes.

Mr. MELLOTT. Was he at the scene of the accident?

The COURT. He was there, but he didn't see it.

Mr. MELLOTT. Did the party involved establish he was at the scene of the accident?

The COURT. Suppose he had not.

Mr. MELLOTT. If he had not, I don't believe the question is proper.

My point is, you cannot go out in the street and pick up a man in the middle of Grant Street. If you can do what the Government is doing, that is what you can do.

I could go out at the time of the trial and get the first person that comes in the door and I would say, without establishing any foundation——

The COURT. Mr. McCaskill was not a fellow from out in Grant Street. He was a high official of your client.

Mr. MELLOTT. But he was not in Portland [5003] at that meeting.

The COURT. I want to understand your contention.

Mr. MELLOTT. My point is you cannot put a person on a stand without establishing a foundation of what occurred or were there. In the accident case you establish the person was at the corner and you can ask what they saw. It is improper to put

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someone on the stand, not lay any foundation, and then ask a series of questions and this has happened time and time again.

I mean in earlier interrogation of some of the other witnesses Mr. Fricano would say, "Are you aware that one of the competitors"——

The COURT. There is no question that happened. There is no question that happened time and time again. The question in my mind is, is there anything wrong with it. That is where we are.

Mr. MELLOTT. I submit there is. You have to lay a foundation. You have to show some knowledge of the witness before you can start asking the witness what occurred. You cannot continually suggest to the witness.

In fact, you should not do it once, let alone continually, suggest to the witness events occurred where there is no foundation to show it occurred or where this [5004] witness has any knowledge of it, and do it time and time again.

We appreciate Your Honor's instructions to the jury and you did it in your opening remarks to the jury, and you have done it at subsequent times, but as is demonstrated by the example that is cited in our brief, quoted from one of the opinions——

The COURT. About the skunk in the jury box?

Mr. MELLOTT. If you put a skunk in the jury box, it doesn't matter how much instructions you give, you cannot keep the jury from smelling.

The COURT. I wanted to demonstrate I read the brief.

[Discussion off the record.]

Mr. MELLOTT. I think that example dramatically indicates and supports the position which we take. We appreciate very much Your Honor's instructions in this area, but it does not cure the prejudice, the unfair and unjust prejudice to the Defendants from this type of a course of conduct.

And the area that troubles me the most is in connection with Mr. Fricano's utilization of the calendars in suggesting that meetings have taken place for certain purposes.

[5005] Now the effect of that, if Your Honor please, is to place on the Defendants—in the first place, we are denied the opportunity to confront anyone that says there was a meeting, because the people that support—except in Mr. Gimlin's case, who was in in reference to the meeting of February, 1965, but in all the others——

The COURT. You could, if you wanted, call Mr. Hunt and put him on the stand and say there was such a meeting, couldn't you?

Mr. MELLOTT. Well, that is, in effect, what I am forced to do, Your Honor, by this procedure, and I believe that is an improper way for the case to be tried. It is a prejudicial way, as far as we are concerned. Suggestions are made at this early stage of the case to the jury about meetings. As a matter of fact——

The COURT. At this early stage of the case? This is the sixth week.

Mr. MELLOTT. It is probably still the early stage of the case, Your Honor.

The COURT. I hope not.

Mr. MELLOTT. Of course, we believe that we have sufficient and substantial grounds for the motion for mistrial, so maybe it is the end of the case.

But assuming, based on the progress that we have been making to date, I think it is an early stage of the case.

[5006] Meeting, which I believe were alleged to be the 5th and 6th of February, getting to 1966, I believe, but, in any event, the calendar pages have been introduced in an effort to expedite this trial. We have tried to not require bringing the people in to show authenticity, Your Honor, when we know the document came from somebody's files, or were produced by the individuals involved. In that case alone, the two entries involved—one of them says, "Call Gene Morgan, Sec", which I believe means call Gene Morgan's secretary.

The other says, "Call Morgan——".

[5007] Mr. MELLOTT. Mr. Fricano in later questions has referred to those as meetings at or about that time. In the first place, even the diary entry only indicates it as "call." Or, at the most it might have been a telephone call.

Throughout the next weeks of trial, until we get to our case—obviously I will have in my case the opportunity to bring people in, but I do not believe that will correct the prejudicial error here, because throughout—in connection with the questioning—the Government has followed the process of trying to set up alleged meetings at or about the time that they said something happened. And here again in this area they misled the jury.

They bring in information concerning the May 1, 1969 price increase. In subsequent questions they suggest that the meeting of the Gypsum Association, the annual meeting, took place just a short time before that. The fact of the matter is, they are trying to confuse the jury—and I believe after it has happened so many times, Your Honor, intentionally—between the effective date and the announcement date.

The announcement dates, by the Government's own exhibits, demonstrate that the announcements were made by the respective companies on different dates at [5008] a time prior to the annual meeting of the Association. This has happened not on one occasion—as we have referred to it in our brief that has happened on several occasions, even following instructions by the Court.

The COURT. Something has come in my mind now. When I said that you did not have to file written motions, that everything could be taken up at this argument that you want to take up, I did not mean to imply that if it called for an objection at the time something occurred that can somehow be corrected by doing it later. Because, if something calls for objection, it should be made then to give me an opportunity at least to give an instruction to the jury.

Mr. MELLOTT. Well, if the Court please, I call your attention to cases which we have cited on page 5 of our brief.

The COURT. I merely wanted to make clear what I meant by saying you can make any argument you want today. I do not mean that in the future you may omit, may fail to object at the time, and then at some time later file a written objection or ask to argue it, or anything else, because you deprive me the opportunity of correcting that.

Mr. MELLOTT. If Your Honor please, I didn't understand it that way.

[5009] The COURT. All right.

Mr. MELLOTT. I was prepared at the close of Mr. Fricano's direct examination of Mr. McCaskill to make another mistrial motion.

The COURT. All right, fine.

That you wouldn't have had to do. You can argue that today. All I am saying is that if something happens at the time

of trial that requires an objection, it should be done then so that I can possibly take such steps as I want at that time.

Mr. MELLOTT. We suggest to Your Honor that that's not the whole answer either, as the courts have recognized, when the misconduct of the prosecutor continues as it has in this case from its very inception. And if anything is picking up in intensity—the cases have held that a failure to object at the time does not excuse prosecutorial misconduct.

We have cited several cases supporting that conclusion and that rule of law in our brief at page 5. In fact, the courts recognize, as we point out there, and as the cases hold, that in some instances an objection made at the time may magnify the prejudicial impact on the jury. And I am sure Your Honor, as a trial lawyer and judge for all the years you have been, recognizes that problem.

[5010] Now, the two points that were involved that I intended to raise at the close of the Government's direct examination of Mr. McCaskill, both of them I consider to be very, very definite acts of complete misconduct on the part of the Government.

Near the end of Mr. McCaskill's testimony, counsel for the Government makes a statement—it isn't even a question. He makes a statement right in front of the jury that this witness knows everything that National Gypsum was doing.

If Your Honor please, there is no basis for that. Your Honor tried to correct it, and we appreciate that. But that is another definite example of the type of conduct, the efforts by Government counsel to testify in this case. Since the evidence doesn't support his position, he tries to put evidence in the record through his own lips to the prejudice of the defendants.

Now, I believe that to be completely improper under the guides that the Justice Department has, that the important thing is to see that justice is done in the case. I also believe it to completely in violation of the canons as we have quoted on page 3 of our brief. The real object should be to see that the defendants have a fair trial based on the evidence. That's all we can ask, Your Honor. That's all we ask. We ask for a fair [5011] trial based on the evidence. But, we object to a trial in which so much is put before the jury in an improper way that is not proved from the witness stand, but rather comes from the mouth of the prosecutor.

Now I won't, as I said, go into detail. One of the principal cases in that area, of course, is the Berger case in the Supreme Court of the United States, which we have cited on page 3 of our brief. And I'd just like to read this one sentence.

The COURT. You know that I know what it says, what the court said in the Berger case.

Mr. MELLOTT. All right. Now, we have also, as Your Honor knows, cited cases in the The Third Circuit which hold to the same effect. We have listed from these cases the five principal areas of misconduct, which have been cited by the cases as most frequently condemned as improper and prejudicial conduct by the prosecutor.

Now, there is no need for me to go into all of those in detail either, Your Honor. But we have gone in the brief and pointed out to Your Honor that not only has the prosecutor engaged in one of those areas of misconduct, in this case he has engaged at length in all five. And we have cited examples in every instance of his attempt to engage in this type of misconduct, with record references [5012] in each instance.

Now, there is only the one additional instance that I want to refer to, Your Honor, which I believe falls under the second heading of expressing his personal belief or suspicion regarding disputed issues. There are things that are occurring in this Court that are not a matter of record. I don't know whether Your Honor has noticed them. We have not as yet made comments on the record about them. But, Mr. Fricano from time to time, when he is interrogating a witness and he gets an answer which he doesn't like, he will make gestures at the counsel table indicating disbelief.

Your Honor has instructed us not to do that. But I would request—we would hope that Your Honor will grant the motion for mistrial. But if Your Honor does not, I would request that that conduct be watched and be terminated in the future.

The COURT. I would want to say now that I have noticed counsel on both sides making facial expressions, gestures, and things like that, and I think I am not going to designate any particular individual. I don't think there is any place for that in the trial of the case on either side, and I hope that everybody—I recognize, of course, that much of this is spontaneous.

People don't do it on purpose. But I would ask self-restraint, [5013] self-control to insure as fair a trial as possible.

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[5014] Mr. MELLOTT. Another point in this regard, Your Honor. When Mr. Fricano was interrogating Mr. McCaskill concerning a report, a photograph, which he suggested, which Mr. Fricano suggested, showed 16 pieces of extra wallboard which had been included on a shipment of wallboard to a customer, and the suggestion was made that it was on there no charge, Mr. McCaskill responded that he couldn't believe that any such thing had happened.

If Your Honor please, at this point Mr. Fricano, with a group of documents in his hand, held them up and in a tone of voice of disbelief to Mr. McCaskill said, "I am holding in my hand evidence to the contrary."

The COURT. Yes. And I said that was improper right at the time, I think, did I not?

Mr. MELLOTT. Well, no, Your Honor—well, what you said was, "Let him finish what he is saying and don't talk at the same time. He is talking, and if he is saying anything incorrectly—" and then Mr. Fricano says, "I apologize."

The record, Your Honor, only has the first part of Mr. Fricano's remark because actually the witness was speaking at the same time, and the record only has, "I am holding in my hand—" but I am sure that counsel at the Government table heard the statement as I did, and I feel confident that the jury did.

[5015] The fact of the matter is, Your Honor, he had no such evidence. The only document that he was able to show Mr. McCaskill following that comment in the presence of the jury was the document that reflected that only one piece of extra board was put on there. And what was it put on there for, for the purpose of protecting the good boards. The exactly proper thing that everybody has been testifying to all along.

Now, Your Honor, this is improper conduct; it is prejudicial to us; it is not giving us a fair trial; and all of the other items that I haven't mentioned does not mean that I don't believe they are equally important, Your Honor. It is just that I don't want to be repetitious. They are mentioned in the brief, and the transcript references are given.

But for all of these reasons, we believe that this case clearly falls within the guidelines of the Third Circuit cases, and the Burger case in the Supreme Court not only supports but requires a mistrial at the point in time based on the prosecutorial misconduct in this case.

[The COURT: All right.]

Now, on the question—I am coming back to that for just a moment—of expressions and gestures. I know, too, from trial of cases that sometimes judges when they are surprised, show it. I don't know whether I do or not. [5016] If I do, it is purely inadvertent. I know that when lawyers get a favorable answer, they show their pleasure. If lawyers get an unfavorable answer, they share their displeasure. They do it, of course, as to rulings as well. I am sure that nobody means to do these things. These are just a sort of reflex action, actions of some kind, and I would hope—I try not to show surprise, although sometimes I hear an answer—not necessarily in this case—but I hear answers that greatly surprise me, and I try not to show it. I am sure I don't always succeed. But I think that we should all try our best not to show displeasure with an answer, disbelief with an answer, happiness with an answer or pleasure or displeasure with the rulings of the Court. There is always one side pleased and one side displeased when the Court rules on something. But I hope we can all sort of follow that. I would certainly, if I thought it was being done as a trial tactic, I would think that would be a highly improper thing. However, none of us have the ability to turn ourselves into complete vegetables. The very kind of an effervescent personality that makes a person a trial lawyer makes him do these kinds of things too.

Mr. MELLOTT. I understand that, Your Honor, but I submit it has occurred so frequently in this case, and when considered in line and in light of all of the [5017] other deliberate and intentional misconduct of the prosecutor in this case, I believe it's part of the total plan.

The COURT. Now, does any other defense counsel wish to say something without repeating anything?

Mr. BARTLIT. Very briefly, Your Honor.

The COURT. I don't know who is first.

Mr. DELONE. I will let him go first.

The COURT. I just thought that he stood up first. That is all.

Mr. DELONE. He was quicker to the draw than I was.

Mr. BARTLIT. I would make two points, Your Honor.

Number one, the Court said the answer to the counter-situation might be to call somebody like Mr. Hunt. There is a problem. Mr. Hunt has pled no contest. We would resist that being brought out, of course, on cross-examination as unfair impeachment. But it is hard to say——

The COURT. Well, you would succeed too.

Mr. BARTLIT. I am pleased to hear that, Your Honor.

The COURT. I wouldn't let anybody be asked whether they had not pled nolo contendere if they [5018] were called as a witness.

Mr. BARTLIT. Thank you, Your Honor.

Finally, then looking at the record, it is apparent to me that the Court has really done its best to try to correct the impression made to the jury. I have noted in reviewing this thing that Your Honor has made—Your Honor many times on your own motion took it on yourself to turn to the jury and say that the question is not evidence; only the answer is evidence, and that sort of thing.

I will say that in a small group of instances, a limited number of instances, the kinds of things that happen in a typical trial, evidence and instructions like that are sufficient. I think without belaboring the point, those kinds of things that have happened here are unusual, and I don't believe that even repeated instructions, even stern repressive measures, as the courts have said, are sufficient to correct it, and I would note, Your Honor, that after all of those instructions and after all of those repressive measures, the things that happened on the eighth and the ninth were by far the most prejudicial for the Government to say to Mr. McCaskill that in point of fact Mr. Hunt was talking to Mr. Morgan about the price increase and didn't he evidence great surprise about it, when there is no evidence of that, is wrong, Your Honor.

[5019] And in the conspiracy case, Your Honor, the next day when the issue is whether Mr. McCaskill and others knew what was going on at other companies, when that is the issue in the case, for the prosecutor to indicate his belief that the witness knew everything that was going on at National, that is wrong.

And what it shows, Your Honor, is this. It shows that the Court and the parties have every reason to believe that this

conduct, which is already not only sufficient, but negates a mistrial, that this conduct will continue. The prosecutor has ignored the orders of the Court repeatedly. The Court has observed on the record that these types of practices are ingrained, habits, on the part of the prosecutor.

Your Honor, it is our view that to continue this trial based on that record is a track record of conduct that is wrong, that is not fair, and it is going to continue. And to continue a trial of this magnitude with the time and money involved in it against that kind of conduct is just putting good money after bad, Your Honor. We are just pouring sand down a rat hole with the time and expense of this trial when we know when the thing is done it is not going to be a fair trial and there is going to be prejudicial error in the record. Your Honor, I say that as sincerely as I can from studying this record for the last three days. [5020] I don't think there is any reason to believe when this trial is over we won't have a continuing and increasing course of action along these lines.

Thank you, Your Honor.

The COURT. Now, I want to refer to Rule 410 of the new Federal Rules of Evidence. It says this: "Except as otherwise provided by Act of Congress, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, it is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer."

And I recognize that that referred to the Defendant himself. But it shows a certain spirit.

Now, then when you go to Rule 609 for the purpose of impeachment—

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the [5021] defendant, or involved dishonesty or false statement——

Now, I believe that there are many, many reasons for interrogation and plea of nolo contendere independent of an admission of guilt. And I would not permit any reference to be made to a plea of nolo contendere by a witness in an effort to impeach him. And I caution—of course, if the Defendants do it, then that is a plague on their house. But if the prosecution made any such reference, I would grant a mistrial.

Mr. BARTLIT. Your Honor, it is very helpful to know that.

The COURT. I said that because I want to caution everybody. I know all judges don't agree with me. Some judges think that a nolo contendere plea is equivalent to a plea of guilty.

Mr. FRICANO. In that connection, because it is an important point, Your Honor, let's assume, hypothetically, that Mr. Hunt does take the stand as Mr. Mellott says——

The COURT. Yes.

Mr. FRICANO. ——and he makes statements that are inconsistent with the statements which he made in open court in connection with his nolo plea.

The COURT. That is a different matter as the rule so provides, that if a person made a statement.

[5022] Now, in the taking of these pleas, I did not ask any of these men to admit guilt.

Mr. FRICANO. But they did admit to certain facts.

Mr. MELLOTT. Mr. Hunt did not admit to any facts, Your Honor.

Mr. FRICANO. I made a statement to the Court in connection with each individual who pleaded nolo contendere, and the Court turned to each man and said: "Is what Mr. Fricano says true?" And both his lawyer, Mr. Armstrong, and Mr. Hunt, said, "Yes, yes."

The COURT. I don't think that is what I said. I said, "Do you wish to contest any of that which was suggested."

I always believed that it is wrong to make a person admit guilt as a part of a plea of nolo contendere, and I know, as I said, I know there are judges that agree with me and I

know there are judges that disagree with me. But that is my belief; that is my rule, and I am going to adhere to it. And if anybody does bring out in cross-examination of these witnesses in the presence of the jury that they entered a plea of nolo contendere——

Mr. FRICANO. I am not suggesting for a minute that I will do that, Your Honor. In fact, I would not do it.

[5023] The COURT. I think that would be highly improper, and I would not only—I don't know whether I would declare a mistrial, but whoever did it might not be worrying about keeping his living allowance within the per diem.

Mr. BARTLIT. Agan, I say, Your Honor, that is very helpful to know, and I appreciate it.

I reiterate what I concluded before, which is simply to say we think this conduct is bad and wrong, and we set it forth in our brief, and we think the clear implication of what is going on today is that it would only continue.

The COURT. What I said was, with proper levity, I hope to avoid any discussion of pleas of nolo contendere, and I think it would be wise not to have off-the-cuff questions about statements made at the time of the plea, because they might go just—they might not be exactly what was said, and the implication might, in my mind, be different from the implication in the mind of the person that is asking the question.

Mr. FRICANO. If Your Honor please, if something like that were to occur——

The COURT. I think we ought to discuss it out of the presence of the jury, at sidebar.

Mr. FRICANO. That's right. We would [5024] discuss it outside the presence of the jury, and I will let the Court know where I am going.

The COURT. With reference to anything that happened while this plea was being taken.

Mr. FRICANO. I will always seek guidance if that situation should arise.

The COURT. Off the record.

[Discussion was held off the record.]

The COURT. Now, we are back on the record.

Mr. DeLone, do you wish to say something?

Mr. DELONE. Yes, sir. I would like just—I was not here. I had to be at the meeting of the counsel of the Antitrust Section, and I was not here when this memorandum was prepared, and I, of course, would be happy to again join in the brief, and I did join in it.

There are just two things—a couple of things I would like to mention to illustrate what, to me, is the vice of what is going on in this trial.

The COURT. The only things are what occurred while you were here.

Mr. DELONE. These were things that occurred while I was here, sir, but, while the memorandum was prepared, I was not here, and I think they are illustrative that we are dealing with a more serious matter than [5025] what I referred to, once, as Mr. Fricano's irrepressibility. I would like to call the Court's——

The COURT. I can sympathize with Mr. Fricano. I have that same problem. I am kind of irrepressible, too.

Mr. DELONE. And I am, too, and I hope Your Honor will slap me down when I am too irrepressible. I hope you do, because that is what I merit. But what I am talking about is something that cannot be dismissed on grounds of irrepressibility, such as grimaces or expressions of agreement, which are almost reflexes. It is more than that.

We cited the ABA standards relating to the prosecution's function in a footnote on page three, which states: "The prosecution has a duty not to introduce inadmissible evidence, not to ask and try to place before the jury in its questions inadmissible matter." And Your Honor will probably recall from the docket case in the Third Circuit, which has been cited here before in another connection—that is 472 F. Sec. 229—that the Third Circuit has endorsed the ABA standards, so I take it that is a succinct way of learning what the principle is of governing what the prosecution's duties are here.

I would call the Court's attention to a statement Mr. Fricano made, which we have quoted at page 17 of our [5026] brief. I use this only to illustrate. The brief points to Mr. Fricano's statement, in the course of the examination of Mr. Gimlin, at page 3318 of the record, when he is asking Mr. Gimlin about whether or not he made notes of the so-called verification calls, and he said:

Now, could you have, without a great deal of difficulty, taken a pencil in your hand and made a little note like Mr. Weiser did saying, 'talked to Atwell today." Could you have done that?

Now, the question to Mr. Gimlin—that could easily have been asked, "Is there any reason you couldn't have made a note," but Mr. Fricano isn't satisfied to stop with that simple question to Gimlin. He wants to suggest to the jury, as he does—he is arguing, in almost every examination, to the jury. He is trying to argue there is something in this record that shows that a Mr. Weiser made a note, "Called Mr. Atwell today." But, if Your Honor will look at the only piece of evidence there is on that subject, it is the document GX 250, and it has a little note written by Mr. Weiser. I have it here, sir. I don't know that you have it available. And all that document shows is that somebody, presumably Mr. Weiser—and Mr. Weiser hasn't been on the stand, and nobody that wrote this note has been on the stand—presumably Mr. Weiser wrote on the document three question marks and the name of Atwell. And, yet, [5027] Mr. Fricano, examining Mr. Gimlin, says, "Couldn't you have made a note like Mr. Weiser did, saying 'talked to Atwell'?"

Now, that is not irrepressibility. He is trying to suggest something of which there is no evidence in the record and to Mr. Gimlin, who had absolutely nothing to do with whatever notes Mr. Weiser may have made.

Maybe Mr. Weiser will be a witness some time, but what need was there for Mr. Fricano to inject into that question what Mr. Weiser did and to misstate it? That had nothing to do with whether Mr. Gimlin made notes or not, and I suggest that is simply—we are confronted with that, question after question. Mr. Fricano is trying to implant in the jury's mind his contentions.

There is a time and a place for that. It is in the opening—not in the opening statement—it is in the closing statement of counsel, not day after day and every question—not every question, but in many of the questions, he is posing it to the jury, and, likewise, it is his duty not to try to get before the jury a matter which he knows is inadmissible.

I would like to call Your Honor's attention to the Government's effort—and, again, I moved for a mistrial before on this

score—to the Government's effort to introduce the document GX 1951 into evidence, the most [5028] obvious hearsay. It only took Your Honor a moment to glance at the document to know the document wasn't admissible, and Mr. Fricano knew it as well as Your Honor did.

[5029] Mr. DeLone. Now that contravenes the prosecutor's duty, as clearly set forth in the ABA Standards. I think the harm that is done is irretrievable.

It is not just one skunk in the jury, it is a passel full of skunks.

The Court. Mr. Spradlin.

Mr. Spradlin. Your Honor, I would make only a few remarks, because most of what I would say has already been said.

I, of course, represent two individual men. This is an unusual case in its present posture, and I think the mere presence of these individuals here requires that the prosecution adhere to and be held to an extra degree of circumspection in the presentation of its case. I do not think that degree of circumspection has been followed.

I know that several of us in this room have been former prosecutors and I say this, with all respect, I do not believe my two individuals are receiving the fair trial they deserve, and I join in the motion.

The Court. Mr. Montgomery.

I want everybody to have a chance.

Mr. Montgomery. I have nothing separate to add, Your Honor. I join in the arguments made in the brief and by counsel this morning.

[5030] Mr. Weber. Your Honor, on behalf of United States Gypsum, I have nothing further to add.

We, of course, join in all the statements that have been made by counsel and wholeheartedly support them.

The Court. May I ask, Mr. Spradlin, was there some way you feel your individuals are not getting a fair trial, aside from the matters that are being raised by the motions here this morning, that you are raising subsilencio, or whatever you want to call it?

Mr. Spradlin. Your Honor, I think that everything we need to cover has been covered in our brief. I do not mean to imply I am holding anything in reserve. What I am saying is that in——

The COURT. I was wondering if you were raising any other issue——

Mr. SPRADLIN. No, Your Honor, I am not.

The COURT [continuing]. Separate from what we are raising this morning.

Mr. SPRADLIN. I am suggesting in a case with individual human beings, I suggest a higher degree——

The COURT. I missed your implication.

Mr. SPRADLIN. I am sorry, Your Honor. I apologize, if I were not——

[5031] The COURT. That finishes everybody.

Another bite?

Mr. MELLOTT. No, Your Honor. I just want to clarify a response which I apparently made to one of Your Honor's questions in connection with the utilization of the calendars as they have been introduced.

I did not dispute Your Honor's suggestions that the jury can infer the meeting took place. I do want to dispute that. I do not believe that these calendars can be used in the present posture in the manner in which they have been introduced in this case, to permit the jury to infer the meeting actually took place.

As Your Honor is well aware, I am sure numerous times you have made entries—I know I have made numerous entries on my calendar on meetings that never occurred.

The COURT. Sure, and I am sure you will argue that to the jury, just exactly that occurs. Sometimes somebody writes something down and it never happens. Sometimes the secretary writes it down and the man whose diary it is never notices it.

What I am saying is I am not the finder of fact and where there is a fact issue, that is not for me to determine.

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[5047] • • •

The COURT. I don't like to see any witness browbeated. I want to say that. I don't like to see anybody browbeat a witness on any side. One of the criticisms that we get is that the public, that they are not willing to come into court and testify to what they know. We have seen that in some cases—not necessarily in this case—but generally there is a criticism of people who witness accidents and who don't want to testify, or people who see a girl being stabbed on the streets don't want to call the police, and they don't want to be a witness. I think we owe a duty to witnesses when they take the stand to make sure nobody does browbeat them. And, frankly, if I see what appears to me to be an example of that, I try [5048] to stop it because I feel that we want to encourage people to come and say under oath what they know, and I don't think we ought to subject them to unusual ordeals when they do it.

Mr. THORSON. Well, Your Honor, we certainly agree that, you know, courtesy should be extended to witnesses appearing in court; however, with respect to the, you know, charges and allegations made by the Defendants in their brief, and I might note that these are in the last five pages of their brief which are beyond the 20-page limit which was imposed by Your Honor, I read those pages anyway.

The COURT. Anything beyond the 20 pages I did not read.

Mr. THORSON. I read them, so I won't respond to them.

The COURT. You can respond to them if you like because I might read them.

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[5052] Mr. MELLOTT. I do have a few more remarks I would like to make on the record, Your Honor.

The COURT. All right.

Mr. MELLOTT. They relate to the comments made by Your Honor in connection with the testimony of Mr. McCaskill.

I obviously do not subscribe to those comments. If Mr. McCaskill's testimony or if his appearance on the stand, at any time, did seem to be difficult, I suggest that the difficulty was a result of his determined effort to try to be as truthful as possible.

The COURT. You understand that what I think about something like that is absolutely unimportant. This is a matter solely for the determination of the jury, and the fact, as I said it—I said it merely to explain what I thought perhaps caused certain kinds of behavior, but I am not going to determine the credibility of Mr. McCaskill or the credibility of any other witness, and I am not going to tell—athough I would be entitled

to tell the jury what I said in open court here, I am not going to do it.

Mr. MELLOTT. I appreciate that, Your Honor. Your Honor said we would all agree. I do not agree with your comments. I believe Mr. McCaskill had difficulty with the questions because of the improper conduct we have [5053] been referring to in the way the questions were asked.

The COURT. You believe that when Mr. McCaskill said, on several occasions, he would like to be of help to Mr. Fricano that is what he would like to do?

Mr. MELLOTT. He was trying to answer the question as well as he could.

The COURT. With no loyalty to the old school ties?

Mr. MELLOTT. Your Honor, I believe Mr. McCaskill was doing his best to be truthful.

The COURT. All right, of course, but these are matters for the jury, and not for me, and I did not state that—make that statement for the purpose of determining what I believe as to the credibility of Mr. McCaskill at all, but merely for the purpose of demonstrating or stating that, sometimes, for whatever reason, a certain witness is difficult to question. We all know that, and, in those kinds of instances, sometimes you have to understand a little more and give a little more latitude to counsel in the manner used in interrogation.

That is all I was trying to say, and I think anybody that has tried many cases in court knows that is true.

Sometimes the pertinent factor, not only of Mr. McCaskill, Mr.—I think Huckleberry was also a very [5054] difficult kind of witness to question, because he would come back, when he was asked a question, with, "Oh, gee whiz," all those Texas expressions, in a sense which made it very difficult for defense counsel to question him.

I recognize that, but I don't mean to say anybody is trying to be dishonest, but these are—sometimes, a witness has a mannerism that makes it difficult, and, when he does, the Court—I do not want to act as a machine, and, in that event, you wouldn't need—a judge has to recognize you have to grant a certain kind of latitude in examining certain kinds of witnesses.

Some witnesses take the stand, limit their answers to the questions asked, and that is easy. Other ones sort of like to sneak things in; that makes it tough.

We all know these things.

Mr. BARTLIT. I beat him again, Your Honor.

The COURT. Yes, you did.

Mr. BARTLIT. Your Honor, these kinds of motions are always difficult to argue, whether in a trial court or Court of Appeals.

The COURT. Sure they are.

Mr. BARTLIT. And one reason they are difficult, apart from the obvious reason, and I adverted to the relationship between myself and both of the leading [5055] prosecutors—another reason they are difficult is because when you take this and you take that little incident and put it under a microscope, that is not the point. The point—there are two points here, Your Honor.

The COURT. I think you are making the point I made; it is a question of balance?

Mr. BARTLIT. That is exactly it. It is like building a stalactite in a cave. One little drop of limestone doesn't mean anything, but, when it builds up, you have 40 feet, and you have problems.

The other issue—and I say this with the utmost deference to the Government and the Court—is the state of mind, and I think Your Honor only has to refer to two things: one, the unusual volume of all these different kinds of incidents over this period of time; and, two, the repeated ignoring, in instances which we have documented, repeatedly, 2, 3, 4 times in a row, when the Court says, "Don't do that," the Government comes back and does it again.

Whether excessive zeal reaches a point where it shows willfulness. I don't know, and I believe it is a point of balance, and I think, respectfully, on the record in this court to date, the balance is not even close. I think the defense counsel, of course, oversteps——

The COURT. That is not what I mean [5056] by balance. I don't mean I compare with—how often the defense does it with how often the prosecution——

Mr. BARTLIT. I know that.

The COURT. It is whether something that may not be proper in my light is so far improper you have to do something. That is what I mean by balance.

Mr. BARTLIT. Yes, and what I have to say is, in my view—this is like a little cold that has spread into a massive infection, and, as I said before, while once, standing alone, can't do it, when I sit back and look at the record and look at the brief we wrote, I can't escape the conviction that we can't have a fair trial under these circumstances, for the reasons stated.

The COURT. Do you want to say something, Mr. DeLone?

Mr. DELONE. Only this, sir. I want to make it clear I don't think we have a quarrel at all with the problems of dealing with—in the way the latitude Your Honor has accorded the Government in dealing with a witness who may seem to be adverse or hostile. That isn't the gravamen of any part of this motion.

The COURT. I hope I did the same for defense counsel when they had two rather difficult witnesses.

Mr. DELONE. That is the point, sir, [5057] and that isn't, it seems to me, at all what the gist or the thrust of our position here is, nor is it, as Mr. Thorson seemed to imply, a question of whether the Government can defend prosecutorial misconduct on the basis of recrimination.

He has tried to suggest the Government did things—whatever they have done is because the Defendants were objecting too much or they did something wrong.

I submit, sir, that we could be a room full of Jerry Kuntslers in here for the Defendants, and that does not alleviate the duties of the prosecution to see that these Defendants receive a fair trial, nor does it excuse the prosecution trying to get before the jury, in the guise of questions, arguments which should be held until the end of the case.

The COURT. I will agree that my duty would be the same if the defense counsel were the wildest-eyed persons in the world. I certainly don't imply that any defense counsel is, because they certainly are not, I think I have tried to say that on numerous occasions, too. I recognize that is a duty of the prosecution, also the duty of the judge, and, however, sometimes one thing leads to something else, and I would recognize that, too, as our

Circuit has indicated when they said certain things being done by one counsel caused the other counsel, in response thereto, to do something he couldn't have done properly [5058] absent that kind of a situation.

Mr. DELONE. Well, Mr. Thorson adverted to the transcript and tried to blame me for Mr. Fricano's reference to National Gypsum.

I would just ask Your Honor, if there is any question on that score, I rest on the transcript, pages 4578 and 4579. I think you will see where that should fall.

The COURT. I am going to rule from the bench on this matter.

I think I want to—because I have more than one matter to rule on, I want to refresh on it a little bit, and then I will—I will rule in writing.

Do you want to say something?

Mr. FRICANO. Only, if Your Honor please, in light of the fact the Court is taking this matter under advisement, we have not provided the Court with a memorandum.

The COURT. Do you want to?

Mr. FRICANO. If the Court would like to have it.

The COURT. I never invite anything like that. If you want to, do it. If you don't want to, don't do it. This a matter for your determination, not for mine.

Mr. FRICANO. I will study the problem.

[5059] The COURT. All right. I wouldn't study it for the next 30 days.

Mr. FRICANO. No, no. When I say I will study the problem, I will study it with the deliberation I usually study matters.

• • • • •

[3123] ROBERT FREDERICKS called as a witness and having been first duly sworn, to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. FRICANO:

• • • • •

[5127] Q. • • • Did you from time to time receive inquiries from your competitors as to what Georgia-Pacific—That is, you, the Bestwall Division and Georgia-Pacific—how they intended to use the distribution centers in the marketing of gypsum wallboard?

A. There were questions, yes.

[5128] Q. Did these questions occur in face-to-face meetings with your competitors?

A. On a few occasions.

Q. Did they also occur at the times of Gypsum Association meetings?

A. They may have. I recall them more in meetings other than Association meetings.

Q. Now, during the course of the discussions which you had with your competitors, subsequent to the acquisition, did the philosophy, your philosophy as the Chief Operating Officer of the Bestwall Division, with respect to pricing of gypsum wallboard, was that discussed?

Mr. KECK. Objection, Your Honor. No foundation. Time, place, and people involved, and so forth.

Mr. FRICANO. I said while he was the General Manager of the Bestwall Division of Georgia-Pacific.

Mr. MELLOTT. I don't think that time period has been established as yet, Your Honor.

Mr. FRICANO. If Your Honor please, that was the first question I asked the man.

By Mr. FRICANO:

Q. Mr. Fredericks, didn't you testify right at the outset that you were the General Manager from the time of the acquisition until you left in April of 1967?

[5129] A. I did.

Q. All right.

Mr. MELLOTT. I am sorry.

Q. Let me get back to my question now.

From time to time when you had these conversations with your competitors concerning the future of the Bestwall Division of Georgia-Pacific in the industry, did they inquire of you what your pricing philosophy was gong to be?

A. The queston would have been—I think—better or more clearly aware of the control and what the authority in pricing was to be.

Q. That was asked you; is that right?

A. Yes.

Q. What did you tell them when you were asked this question?

A. I indicated that the pricing and policies and control would continue as they had under my direction in Paoli, our headquarters.

• • • • •

[5130] Q. Did you ever tell them, these competitors of yours from time to time what your personal philosophy was concerning profits, the maximization of profits and list prices?

A. Yes.

Q. What did you tell them?

A. I expressed at any opportunity my own personal corporate profit motivations. Namely, to maximize earnings.

[5131] Q. How?

A. In whatever would be required. Maximizing price levels and buying and reduction of price.

Q. Did they indicate to you at these times what their personal—Not their personal, but corporate pricing philosophy?

Mr. MELLOTT. If the Court please, I object to this whole line of questioning unless the specific conversations are pinned down, unless a proper foundation is laid for a particular conversation on a particular date with particular people.

I object to this generalization over a long period of time without any attempt to tie it down to people, person, dates, or anything of that sort.

The COURT. There has to be an egg laid before the chicken can be hatched. So, we have to start somewhere and then get to the specifics.

By Mr. FRICANO:

Q. In that connection, Mr. Fredericks, from time to time when you had these conversations with your competitors, did they indicate a similar philosophy?

A. No.

Q. What did they say?

A. I don't recall specific conversations. And my best memory is I was answering questions.

* * * * *

[5200] Q. * * * Were your subordinates engaged in the practice of exchanging credit and pricing information between themselves—I mean between Georgia-Pacific, on the one hand, and your major competitors on the other hand?

A. Yes, they were.

Q. Can you identify these—the people who were doing this frequently?

A. The extent I knew of it, it related solely to Mr.—a Robert Sikes, S-I-K-E-S.

Q. Now, when did you first learn of it?

A. I learned of it through the control and amount of allowances that we were granting, which would have been while I was still a financial officer, and then continuing on when I was named president.

Q. Um-hum. Did you authorize the continuation?

A. I didn't—that is a tough question.

Q. I will rephrase it for you. Did you ever tell any of your subordinates or Mr. Sikes, that is, who was engaged in those practices you testified to, to stop?

A. No, I never told him to stop.

Q. Now, Mr. McCaskill was your immediate subordinate; was he not?

A. Yes.

Q. Do you know whether McCaskill was engaged in this practice or not?

[5201] A. Now or then?

Q. Well, then is—as of the time that you were actually——

A. No, I wasn't—as I say, I thought it was solely Mr. Sikes.

Q. Do you know whether or not Mr. Meyer, Al Meyer——

The COURT. He said he thought it was solely Mr. Sikes.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Why did you allow it to continue? What was your purpose?

A. The purpose was to verify price extensions in the marketplace. The record that we maintained and the amount of rec-

ords that we had indicated it was not at all excessive, and we were operating this policy and program with the knowledge and approval of our corporate counsel.

* * * * *

[5204] Q. * * * What about the purpose for which you allowed this, the business purpose for which you allowed this practice to continue?

A. I was attempting to minimize deviations from list price. We were under heavy pressure from our field sales organization to meet what they termed to be competitive pricing and I wanted to be certain that these actual requests were a matter of fact.

Q. Did this have anything to do with your policy on maximizing profit?

A. Certainly the result of minimizing discounts would maximize profits, yes, sir.

Q. Now you have testified generally on what Mr. Smith, the lawyer, did at the time.

A. Yes.

Q. Did you know everything that was going on at that time, Mr. Fredericks?

A. No, indeed.

Q. Did you find out anything subsequently about the pricing exchange that you didn't know before?

A. Yes, indeed.

Q. What did you find out?

[5205] A. Are you relating to the testimony and documents I have seen and the——

Q. Documents you saw at the time, right at the time.

A. Oh, at the time.

It was my feeling through 1965–1966 my subordinates were, in effect, keeping me fully advised, and I did feel at that time that I was aware of what was happening.

Q. Did you ever see a document which differed from the conclusion you have just articulated?

A. I have seen a lot of documentation that indicates I didn't have all the facts, yes, sir.

Q. Do you ever recall seeing a document by another lawyer, a Georgia-Pacific lawyer, Mr. Crowell?

A. Yes, I have.

Q. In which he goes into the gypsum pricing study at the request of Mr. Hunt and you?

A. That is correct.

Q. You did see that?

A. I did.

• • • • •

[5206] Q. Is that the series of memoranda to which you referred, memorandum from Mr. Hunt on top to you?

A. Right.

Q. Dated December 2, 1966, on which he comments on the five proposals by Mr. Crowell which are contained in the memorandum to which it is attached?

A. Yes.

Q. Now point number 4 in his proposal, that is Mr. Crowell's proposal to Mr. Hunt, and then Mr. Hunt's recommendations to you was with respect to keeping a record of these contacts. Did you ever do anything about that?

A. Not that I can recall.

Q. Were you aware, of your own knowledge now, were you aware that others in the industry besides Georgia-Pacific were exchanging pricing and credit information?

A. Yes.

[5207] Q. Did you ever personally engage in this practice?

A. I did not.

Q. This was delegated to your subordinates, is that correct?

A. Yes.

[Cross-Examination]

• • • • •

[5221] • • •

Q. Mr. Fredericks, you were in the Gypsum Division or the Bestwall Division of Georgia-Pacific from May 1965 to April 1967; is that correct?

A. No. May 1963.

Q. No. I am talking about with Georgia-Pacific.

A. Oh, with Georgia-Pacific? Right. May '65 until April 1967, correct.

Q. So just approximately two years; is that correct?

A. Correct.

Q. Now, even though you remained with Georgia-Pacific for some period of time following April 1967, did you have any [5222] responsibilities whatever with reference to the distribution of gypsum wallboard products?

A. No, I did not.

Q. Did you have any responsibilities whatever with respect to the sale and pricing of gypsum wallboard products after April 1967?

A. No, I did not.

• • • • •

[5226] • • •

By Mr. Mellott:

Q. Now, Mr. Fredericks, in your direct examination by Mr. Fricano, he asked you various questions concerning conversations which you may have had with a competitor or competitors from May, 1965, to April, 1967, in which you [5227] had advised them with respect to the situation following the acquisition of Bestwall by Georgia-Pacific. Do you remember that?

A. Yes, I do.

Q. Now, isn't it a fact, Mr. Fredericks, that the only statement that you were making to the competitor at the time that those conversations took place was to the effect that the Bestwall operation was going to be run from the headquarters at Paoli following the acquisition in the form and manner that it had been run in the past?

A. Yes.

Q. That is what you were saying; right?

A. Yes.

Q. The same type of thing that is usually said by a company following the acquisition of another company; isn't that correct?

Mr. Fricano. Objection, Your Honor.

The Court. All right. Go ahead. Answer it.

The Witness. That's right.

By Mr. Mellott:

Q. Now, isn't it a fact, Mr. Fredericks, that these conversations to which we have just referred did not relate to any price

or other term or condition of sale to be put into effect by Georgia-Pacific or one of its competitors [3228] in the future with reference to the sale of gypsum products?

A. That is correct.

• • • • •

[3236] OLIVER EUGENE BURCH called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

• • • • •

[3240] • • •

The evidence in this case that has been introduced so far by Georgia-Pacific shows sporadic note-taking, as the Court has heard from various witnesses. However, there came a point in time when this note-taking stopped and we will show through this witness it was coincidental with the wallboard case on the West Coast and the investigation by the United States in the gypsum industry.

The COURT. You can show it was coincident with investigation by the United States, but unless [3241] you can—not with the civil litigation.

Mr. FRICANO. All right, Your Honor.

Will we be allowed to show that at the time he stopped in 1972 was on or about the time shortly after the first Grand Jury session?

The COURT. That led up to this indictment?

Mr. FRICANO. Pardon me.

The COURT. That led up to this indictment in this case?

Mr. FRICANO. Yes.

The COURT. Oh, yes, you can show that.

• • • • •

[3247] Q. In 1972, did you from time to time contact your competitors in order to exchange prices and terms of conditions of sale with them?

A. In 1972?

Q. Yes, sir, '72.

A. I believe, to the best of my recollection, that in the early part of '72 I either had a call or made a call to a competitor to verify a price.

Q. Did you have any such calls or contacts, either way, subsequent to the early part of 1972?

A. I don't believe so. It may have happened, but I don't think so. I think, to the best of my recollection, 1972.

Q. Did you know at what point in time the Grand Jury investigation that led to the indictment in this case began?

A. I don't recall that, but I was aware of when it began, yes, but I don't recall that date.

Q. All right. Did you make a conscious decision to stop checking prices with competitors in 1972?

A. Yes.

Q. Why did you make that decision?

A. Because of the obvious—it had been my impression [3248] up to the point that I decided that it should be stopped that price verification on rare occasion was legal.

There seemed to be a great deal of doubt about it, as envisioned by the Grand Jury investigation, so I went to my superior and asked him if he would please give me a direct order that there would be no more price verification.

Q. Now, your superior was Mr. Wilson, was it not?

A. Yes, sir.

Q. Did Mr. Wilson know that you had been engaging in this practice from time to time?

A. Yes, he did.

Q. All right. Now, Mr. Wilson, what was his title?

A. He was vice president and general manager of the Gypsum Division of Georgia-Pacific.

Mr. FRICANO. May the witness have GX 18.

The WITNESS. Thank you.

By Mr. FRICANO:

Q. GX 18 is in evidence, Mr. Burch, and it is a memorandum, is it not, from Mr. Crowell to the individuals listed below?

A. Yes, sir, it is.

Q. Mr. Crowell is the Georgia-Pacific lawyer, is he not?

A. Yes, he is one of Georgia-Pacific's attorneys.

[5249] Q. That's right.

A. He is no longer, sir, but he was.

Q. Right. He is not emloyed by Georgia-Pacific any longer?

A. No, sir, he is not.

Q. Is he retired?

A. No, sir. He is employed by Louisiana-Pacific Corporation.

Q. All right. Now, this memorandum is dated February 4, 1969, is it not?

• • • • •

[5250] Q. Have you had an opportunity to read that now, Mr. Burch?

A. Yes, sir, I have.

Q. Now, without discussing what's inside that memorandum, you can't, do you see on the front of it that Mr. Hunt is copied and your superior, Mr. Wilson, is copied?

A. Yes, sir. That's true.

Q. Now, this relates generally, does it not, to the practice that you were engaged in? Does it not?

A. Yes, sir.

Q. All right. It is fair to state—well, let me ask you this: Have you ever seen this memorandum?

A. Yes, I have.

Q. When?

A. Within the last couple of days.

Q. I didn't show it to you, did I?

A. No, sir.

Q. Had you seen it at or about the time that it was issued?

A. No, sir. I am sure——

Q. Pardon me. I am sorry.

A. I am sure that I hadn't.

[5251] Q. Had not or had?

A. Had not.

Q. Had not. Did Mr. Wilson advise you in any size, shape, form or manner, that is, Mr. Wilson, your superior, of the contents of this memorandum?

A. I don't believe so. I don't believe I have seen this particular document before, and I don't believe—and I am sure that I have not been instructed of the contents of the document.

• • • • •

[5257] Q. Did you have any of your associates—When I say "your associates," your subordinates—also engaging in the practice of exchanging prices and other things with competitors?

A. I have given this a great deal of thought since the Grand Jury investigation. I had instructed my associates when, sometime shortly after I became General Sales Manager, not to verify prices. However, there is one area. Mr. Fatz was responsible for our day-to-day relationship with Johns-Manville, and Mr. Fatz may have verified prices. I am not—I don't recall. I don't think—It was not, I don't think, a continuing practice, but it may have happened.

• • • • •

Q. At what time did you give your instructions to Mr. Fatz not to engage in this practice? Do you remember the approximate time?

A. I don't recall. But there were firm instructions given to all my staff, some time after I became General Sales Manager, not to engage in price verification. I just don't recall the exact time.

[5258] Q. All right, sir.

We will try to show you a document here in a moment to see if we can refresh your recollection in that regard.

A. Fine.

Q. Why didn't you allow—Excuse me, I withdraw that. Why did you tell your subordinates not to?

A. Well, I don't recall making a conscious decision as to why. I guess I had discussed this at times with our attorneys, and had been advised that if I felt the extreme need of verifying a price, that it was legal to do so on extremely rare occasions, and therefore I wanted to be sure of how often it was being done within our organization. Then I suppose that that would be the reason that I instructed "Do not verify prices."

Q. Mr. Burch, I want to refresh your recollection. Now, you have just seen two documents dated February 1969, one which was read to the jury from Mr. Sand to the branch managers. That was prior to the time that you became General Sales Manager.

A. I recognize that, sir.

Q. Now, is it your testimony that after you became sales manager in June of that year, June of '69, you had conversations with your attorneys authorizing this practice that Mr. Sand said they couldn't do?

[5259] A. In spite of that letter, that is true, sir. That's why I was surprised when I saw that letter, because I had never seen that letter before.

Q. What attorney?

A. I was trying to place that, too. It was either Mr. John Crowell or Mr. Will Craig. Perhaps Frank Brewer, who is our head counsel. But it was either Mr. John Crowell or Mr. Will Craig or Frank Brewer, one of those three.

Q. Now, Mr. Burch, on GX 18, which is the memo from Mr. Crowell to all the people listed below, dated February 4th, Mr. Brewer, the attorney whom you just identified, is listed.

A. I know that, sir. But that's the truth.

Q. Well, did they give you any explanation at all on the one hand if they said to stop, and on the other hand he didn't tell you to stop?

A. I didn't know that they had said "stop." I didn't know the existence of that memo until I just saw it this week-end.

* * * * *

[5260] Q. * * * In the period from June 1969 to when you say you stopped, please identify those persons with whom you had such contacts and where, whether it was over the telephone or where it happened.

A. Yes, sir.

Any price verification that I have done has been on extremely rare occasions, very few in number.

Q. Mr. Burch, I didn't ask you that. I asked you to identify the individuals with whom you had them, sir.

A. Well, I am trying to explain, sir, that it is difficult to remember all of them, but I will try as best I [5261] can.

Q. All right.

A. I know that I have had calls from and have made calls on occasion to Mr. Don Miller of the Celotex Corporation. Mr. Miller had an assistant, Mr. Jerry Fisch, of Celotex Corporation. I believe I talked to Mr. Fisch one time.

I believe that I have had a call from Grand Rapids Gypsum. It would have been either Mr. Larry Murray, or Mr. John Maddox. Those are the only specific instances that

I can be absolutely sure of, sir. I am sure that I have had a call from others.

Q. What about Mr. Ted Armstrong, Sr., of Texas Gypsum Company?

A. Yes. I am sure that Mr. Ted Armstrong, Sr., of Texas Gypsum called me.

Q. Now, Ted Armstrong, Sr., is the President of Texas Gypsum; is he not?

A. Yes, he is.

Q. Now, is that the company that used to be run by Mr. Huckleberry?

A. I am sorry, sir, I don't know Mr. Huckleberry. I have heard the name, but I don't know. I couldn't tell you whether that's true or not.

[5262] Q. Did you—I am asking for your best recollection, now. You used the word "specific," before. What is your best recollection? Did you, from time to time, in this period, have such telephone calls with officials of United States Gypsum, National Gypsum, Kaiser Gypsum, and Flintkote?

A. I don't believe I have had a verification call or made a verification call to anyone at United States Gypsum.

Q. National?

A. I have talked to Mr. Ken Atwell of National on several occasions. I don't believe price verification was ever involved.

Q. Kaiser Gypsum?

A. I am sure that I have talked to no one from Kaiser Gypsum.

Q. Flintkote?

A. I don't believe so. I have had many conversations with people at Flintkote, but I don't believe a price verification.

Q. Now, you just stated categorically you have not had a price verification, using your terminology, with anyone from United States Gypsum in this period; did you not?

A. I don't believe so.

* * * * *

[5265] Q. That's right. Did you make a record of these telephone calls?

A. No, sir.

Q. Why not?

A. Just didn't think it was—I guess, at that time, didn't think it was important. Now, if you mean a formal record, I did not keep a formal record of them.

Q. A handwritten note, one line?

A. No, sir.

Q. Did you ever engage in exchange of this information at Gypsum Association meetings?

A. No, sir.

Q. Why not?

A. The Gypsum Association is, by its very nature—[5266] you have to be extremely careful because of the limited number of manufacturer members, and I have been advised—never did discuss anything but Gypsum Association business at Gypsum Association metings, other than your normal social functions.

Q. Is it fair to state that you were advised not to engage in this practice that you were engaged in at Gypsum Association meetings?

A. I am sure that would be fair to say that; yes.

Q. How did you learn of—did you initiate this practice in June of 1969 of checking with competitors?

A. No, sir.

Q. Who did, at Georgia-Pacific, do you know?

A. No, sir, I don't.

Q. Who was employed at Georgia-Pacific at the time that you became general sales manager that knew about this practice, other than Mr. Wilson?

A. Mr. Meyer.

Q. A. L. Meyer?

A. Yes, sir.

Q. Did he identify, at any time, to you, people with whom you could check prices?

A. To be truthful with you, I can't recall how I became aware of price verification. I suspect it probably was in talking to Arnold Meyer. I suspect that I may have been, [5267] as a result of some legal actions. I certainly received calls from a competitor shortly after I became general sales manager, I am sure. I don't know which one or who it was.

Q. You did attend Georgia—not Georgia-Pacific Association—but Gypsum Association meetings; did you not?

A. Yes, sir.

Q. And you learned who your counterparts were at such meetings; did you not?

A. Yes, sir. As a matter of fact, I was already aware of that. I had known many of them for a good number of years.

Q. You knew Don Miller was a pricing man?

A. Yes, sir.

Q. Was he also at these meetings, these Gypsum Association meetings that you attended?

A. Some of them, sir.

Q. When you made a call, from time to time, and, from time to time when there was an incoming call, did either you or the other person refuse to give out the information concerning the price?

A. Yes, sir.

Q. Why?

A. I don't know why the other person would refuse, but I know why I would.

[5268] Q. Why did you refuse?

A. There were certain accounts that we felt were extremely important to the interests of Georgia-Pacific, that we felt was not in our best interest to discuss our marketing policies.

Q. Would one of those accounts be M. Ecker and Company in Chicago?

A. Yes, sir.

Q. Were they a large volume account of Georgia-Pacific?

A. At one time, they were; yes, sir.

Q. Let's say in the period that we are talking about, 1969, 70, '71, and '72, up until the time you stopped.

A. No, sir. In 1969, they were, and probably some time in 19—I would say late '69, we stopped selling Mr. Ecker.

* * * * *

[5273] Q. * * * If you wouldn't discuss certain accounts, why did you check prices with competitors on other transactions?

A. We were concerned with the ramifications of the Robinson-Patman, for one reason. We wanted to be sure that we were not being led on by a dealer who wasn't telling us the truth. So it became necessary at times, on rare occasions, to verify the existence of a competitive price. Sometimes, I frankly doubted that it was true.

Q. Were there any other reasons, sir?

A. That would be the main reason, sir.

Q. It is not fair to say one of your reasons was so that Georgia-Pacific would not lower its prices beyond that what the actual market condition warranted?

A. I have given that one a lot of thought, too, sir.

Q. That is in your Grand Jury testimony?

A. Yes. I know it is, and in thinking about it, the price had already been lowered when a price verification had been made, or it was represented it had been lowered. I am not sure that's true.

Q. You are now saying your Grand Jury testimony is not——

[5274] A. I am not sure it is accurate. I am not sure I was speaking correctly.

Q. You said you gave it a great deal of thought. Did anyone help you in your thinking?

A. I am sure everybody helped me, sir.

Q. Has Mr. Mellott helped you?

A. Yes, sir, you betcha.

Q. Have any other personnel at Georgia-Pacific helped you?

A. You mean have I——

Q. Have you discussed it with other people at Georgia-Pacific?

A. I have discussed it with Mr. Wilson at times, yes.

Q. Did he help you, too?

A. Yes, sir.

Q. Now you have testified that you wanted to make sure that the customer was telling you the truth, is that right?

A. Yes, sir.

Q. Isn't it a fact that you were more concerned with your salesmen than you were with your customers?

A. I am sure that is not a fact, no, sir.

Q. Didn't you testify——

A. I was going to continue, sir, but salesmen [5275] sometimes will not always tell you the truth, or they will unintentionally misinform you on what the truth is. But I think both of them are equally important. I think you have—that you have to be certain that your customer is not lying and your salesman is not lying or has misinformed you.

The Court. Of course, either the customer or the salesman could be mistaken.

The Witness. It could be unintentional misinformation, yes, sir.

By Mr. Fricano:

Q. When you made these telephone calls from time to time, were you also at that time trying to check up on your salesmen?

A. No, I don't believe—I don't believe that. I don't believe we were physically trying to check up on our salesmen. We were trying to be sure the salesmen had not misinformed us intentionally or unintentionally. I don't believe the word check up on the salesmen is correct.

Q. Didn't you testify before the Grand Jury—I will withdraw that previous question.

Is it the fact that salesmen at Georgia-Pacific had a tendency at times to report alleged competition where none, in fact, existed?

A. That is true of any salesman, sir, not just [5276] Georgia-Pacific.

Q. Why is that?

A. That is the way they are. A salesman is enthusiastic by nature and sometimes when his territory is not going well, he will be misled more easily than should be, or actually will fabricate a story. It has been known to happen, yes, sir.

Q. I asked you questions earlier as to why—withdrawn. I will reask the question.

Now you have indicated why—well, you have not indicated why would you respond to inquiries from competitors seeking information with respect to the price Georgia-Pacific was charging individual customers.

A. Why would I respond, sir?

Q. That is right.

A. So, obviously, if on occasion I would make a price verification inquiry, if I expected the competitor to respond to my inquiry, I would have to respond to his inquiry as honestly and sincerely as I best knew.

Q. You have given an explanation about the Robinson-Patman Act and one other. And was there another business purpose in your responding to competitors, aside from the two you have mentioned?

A. Another business purpose?
Q. Yes, sir.

[5277] A. I don't know. Perhaps.

Q. Isn't it a fact, sir, that one of your purposes, in addition to those other two, would be so that you would not contribute to the competitor making a move in an account that you were presently dealing with at a certain price level, and forcing you, Georgia-Pacific, to make the same move inadvertently? In other words, you did not want to destroy your own market?

A. That is true enough, sir, yes.

Q. If you don't tell him and he guessed wrong, that price would go right down, wouldn't it?

A. Yes, that is true.

Q. And conversely, if you called him and he wouldn't talk to you, the price would go down?

Mr. WARNKE. Objection, Your Honor, speculation.

The COURT. You can express the opinion.

The WITNESS. Would you repeat it again, then?

Mr. FRICANO. Sure.

By Mr. FRICANO:

Q. If you didn't tell him on a particular matter what the price level was, the price would then go down also, as in your case?

[5278] A. You are assuming that the story is not true?

Q. That is correct.

A. If it is true, the price has already gone down.

Q. If it is not true.

A. If it is not true, there is a danger of the price going down.

Q. Do you ever recall whether or not any of your competitors in this industry, who engaged in this practice, at any time discontinued the practice?

Withdrawn.

Did any competitor of yours with whom you were exchanging prices ever tell you that they were going to stop the practice?

A. I don't recall that.

Q. Now, did you, from time to time, exchange price lists with your competitors?

A. I have received competitive price lists. It is not unlikely that Georgia-Pacific price lists have gone to a competitor. I can't recall that having been the case. I think that Georgia-Pacific lists generally did not go to any competitors.

Q. Did you or did you not exchange price lists with Celotex, Mr. Miller?

A. I have received price lists from Mr. Miller and I believe you are right, one time I sent him a set of price [5279] lists long after the prices had been published.

[5280] Q. Did he tell you why he wanted them?

A. He said he was—as I recall, he said he was having difficulty picking them all up in the field.

Q. Did you find, within your experience, that prices, list prices of Georgia-Pacific and its competitors on the high volume items, half-inch, regular, five-eighths-inch; fire-rated, were the same?

A. Generally speaking, the list prices were the same.

* * * * *

[5285] Q. 2164. Now, that's the 1971 policy manual; is it not?

A. It was issued in August of '71.

Q. Now, that states, does it not, on page 37—have you got page 37 there?

A. Yes.

Q. I think we are right, now. On page 37, under the heading, "Pricing Practices," and then going over to 38, are the instructions as to the do's and the don't's concerning relationships with competitors; is it not?

Q. All right. Now, after having read that——

A. I haven't read it all, sir. I have just generally—do you want me to read it all?

Q. Well, why don't you read to yourself paragraph two and paragraph four? Paragraphs two, three, and four—excuse me—two, three, and four—to yourself.

A. Yes, sir.

Q. All right. Now, having read those three paragraphs, is it fair to state that the policy of Georgia-Pacific Corporation was not to exchange prices with competitors—excuse [5286] me—was not to exchange price lists with competitors?

A. That would be the general policy; yes, sir.

Q. This is in '71?

A. As issued in this, of August of '71.

Q. And is it also fair to state that, in August of '71, the published policy of the company was not to have its officials or its employees exchange prices with competitors?

A. That's true.

Q. Now, do you know whether or not this was also the policy in 1965?

A. I don't know for sure because I had just come with Georgia-Pacific in '65.

Q. Did you read the—do you recall whether or not you read the 1965 policy manual?

A. I don't recall, sir; no.

Q. Would you take a look at 2162, please, and I hope this is the 1965 one.

A. Yes, sir.

Q. Is it the 1965 one?

A. Yes, sir, January of '65.

Q. All right. Would you please go to page 27 on that, and I wish you to read—and it is very short—under the heading, "Pricing Practices," the several paragraphs there that go over to page 28?

A. Yes, sir.

[5287] By Mr. FRICANO:

Q. All right.

Now, having read that, sir, is it fair to state that it was the printed policy of Georgia-Pacific in the year 1965 not to exchange prices with competitors?

A. Not to exchange prices with competitors, yes, sir.

Q. In fact, Mr. Burch, throughout the period from April 1965 after the acquisition, right to today, it is the policy and has been the continuing policy of Georgia-Pacific not to engage in the practice that had been going on since 1965; is that not correct?

A. It obviously was a printed policy, as expressed in these manuals. The extremely rare instances of price verification that I was making or responding to, done on very rare occasions, not more than—I would guess—ten times in the whole time I was General Sales Manager, where my superiors were aware of it and our attorneys were aware of it. And I had been told that it was legal and that up until the time it became such a strong question in these proceedings that we stopped it.

Q. Well, were these the only proceedings you were influenced by?

Mr. MELLOTT. If the Court please, I object to that question for reasons we previously discussed.

Mr. FRICANO. This is a fair question, [5288] Your Honor.

The COURT. Objection sustained.

Mr. FRICANO. I am sorry; sustained?

The COURT. Sustained. It seems to me that that is going into something I said you couldn't.

Mr. FRICANO. Well, I thought with the foundation which had been laid that the posture of the case would now allow it.

The COURT. I don't think so.

Mr. FRICANO. All right.

• • • • •

[5316] Q. Now, with respect to the exchange of price information, when you were participating in it with your competitors, during the period from May-June, excuse me—June, '69, to the first part of 1972, directing your attention to that period and only that period, did you notify any of your customers that you were exchanging information relating to them——

A. No.

Q. [continuing]. With your competitors?

A. No.

Q. You did not. Did you advise your salesmen that you were relaying information, which they conveyed to you concerning their customers, to your competitors?

[5317] A. No.

• • • • •

[5319]. The COURT. • • •

In those instances where you did call a competitor to verify prices for the reason that you have given, how would you establish it?

Mr. MELLOTT. Well——

The COURT. Don't interrupt me, sir.

Mr. MELLOTT. I am sorry, Your Honor.

The COURT. Not my question, but his, is how would you establish you did it if you didn't make a record?

The WITNESS. How would I establish I made a call?

The COURT. Yes.

The WITNESS. I would have no means of establishing I made that call.

The COURT. All right.

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[3320] By Mr. FRICANO:

Q. Every question I have asked you, you have managed to work in your answer the words, "rare, infrequent," and so forth; haven't you?

Mr. DELONE. Objection to that question.

Mr. MCSWEENEY. Objection.

The COURT. Well, it is not a question—well, all right. Objection sustained.

By Mr. FRICANO:

Q. Isn't it fair to state, Mr. Burch, during the period from June, 1969, to January of 1972, you had your most frequent contacts?

A. Yes, sir. That would be true.

• • • • •

[3321] • • •

Q. Have you ever given credit memoranda?

A. Yes, sir.

Q. Now, when you give credit memoranda and you give a Georgia-Pacific check, is that reflected in any way in the invoice?

A. The credit memorandum is an invoice, sir.

Q. Well, don't you bill your customers separately from a credit memoranda, Mr. Burch?

A. I guess what you are getting at, we issue an invoice, and then a credit memorandum which is also an invoice.

Q. Yes.

A. Yes.

Q. Now, is the invoice price the real price you are charging the customer when you issue a credit memorandum?

A. Not always. Sometimes it is not.

Q. In each instance where a credit memorandum or a Georgia-Pacific check is given to a customer, is it not the [3322] fact the invoice price is different from the actual transaction price?

A. Yes, sir; that is true.

Q. Why do you do that?

A. There could be several reasons. Number one——

Q. What are your reasons?

A. Number one, we don't want the price we are actually charging for the materials to become commonly known in the marketplace.

Number two, many times, the customer requests us to handle it in that manner.

Quite often, 84 Lumber, which we mentioned here, is a good example of that. Quite often, the customer has a chain of yards and he does not want his own yards to know what he is paying for the material. He retains these discounts in his office to cover his overhead. We have several accounts like that, that insist upon being invoiced in that manner.

[3323] Q. By invoicing list prices and giving a subsequent cashier's—Excuse me, Georgia-Pacific check or a credit memorandum. Aren't you in those instances preventing 84 Lumber's competition—or whoever is getting that discount—from finding out?

A. Yes, it has that effect.

Q. And isn't it true if this discount became known in the marketplace it would have a tendency to have prices go down?

A. That's true.

Q. So this is another method of keeping prices up; is it not?

A. That's a method, yes.

[3324] Q. And do you know it to be the fact, Mr. Burch, that your competition used the same techniques?

A. Yes, I know that to be a fact.

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[3333] CROSS-EXAMINATION

By Mr. MELLOTT:

[3334] • • • • •

[3335] Q. Isn't it correct, Mr. Burch, that the terms and conditions of sale did not stay the same from March 1, 1966 down to the present time?

A. That is correct. I was mistaken.

Q. And also, Mr. Burch, in responding to Mr. Fricano on direct you referred to these terms and credit terms for the Gypsum Division. Mr. Burch, isn't it a fact that the individual branch managers in the various branches of Georgia-Pacific varied their credit terms from time to time?

A. That is true, and still do today.

Q. And isn't it also a fact that beginning in 1968, before the applicable statutory period to this proceeding, substantially all of the sales of gypsum wallboard products at Georgia-Pacific were made through the branch managers?

A. That is true, the great majority of the sales on the gypsum wallboard products.

[5336] Q. This morning Mr. Fricano asked you whether or not it wasn't a fact that the most frequent instances of price verification calls in which you were involved with competitors took place from June, 1969 until early 1972.

Do you remember that?

A. Yes, sir.

Q. Now isn't it a fact that except for that period of time you personally did not engage in any verification calls?

A. That is correct.

Q. So even if you made one call within that period, it would be more frequent than what you had done outside of that period, isn't that correct?

A. Yes, that is true.

Q. Now, Mr. Burch, how many calls, to the best of your recollection, were made by you or received by you during this period from June 1969 through either January or February, 1972?

A. Well, they would be very infrequent. I don't really recall how many exactly. There were a few initiated by me, a few more that I received. Guessing, I would say 10, maybe, or 12 in total during the whole period that I have been general manager.

Q. Do you think there would have been any more than 12?

[5337] Mr. FRICANO. I move to strike on the guess. He didn't keep notes. How can he guess now?

Mr. MELLOTT. If the Court please, the same information was elicited on direct by Mr. Fricano.

Mr. FRICANO. Then it is repetitious.

Mr. MELLOTT. It is a foundation.

The COURT. Go ahead.

By Mr. MELLOTT:

Q. Mr. Burch, your best recollection during that period would you have been involved in more than 10 to 12 calls?

A. I don't think so.

Q. Would you agree with me that a period from June, 1969 through January, 1979, that is a period—I am sorry. I am sorry. From June, 1969——

Mr. FRICANO. I will object to this question, because he is asking the witness to agree with him.

Mr. MELLOTT. Will you agree with me on the number of months between June, 1969 and January, 1972?

The COURT. We will take judicial notice of the number of months between those two dates.

Mr. MELLOTT. Could we agree that is approximately 30?

The COURT. It is not approximately. [5338] It is a certain number of months.

By Mr. MELLOTT.

Q. If we have 10 calls during that period, it would average out to approximately one every three months, is that correct?

The COURT. In other words, you are saying it is 30 months and 10 calls and 10 calls goes into 30?

Mr. MELLOTT. 31 or 32 months, depending on whether it is January or February, Your Honor.

The COURT. All right.

By Mr. MELLOTT.

Q. That is the reason why, isn't it, in your direct testimony you referred to the number of these calls as being rare and infrequent?

A. The reason why I referred to them as being rare and infrequent, I was making hundreds, maybe thousands of price decisions during that period of time, of which very rarely or infrequently did a verification call ever come into it.

The COURT. All right, sir.

By Mr. MELLOTT.

Q. Now when you had these 10 to 12 verification calls over this period, isn't it a fact that those calls related only to verifying past events?

[5339] A. Yes, sir, that is true.

Q. Did they in any case relate to a question as to what action was going to be taken by you or by the competitor in the future?

A. No, sir.

Q. Now when Mr. Fricano stated in questioning you near the end of his direct examination this morning, that you told competitors what you were doing, did you at any time, other than in these few verification calls that you have referred to, tell your competitors what you were doing?

A. No, sir.

Q. Now also this morning Mr. Fricano got into, questioned you about the utilization of credit memoranda that were issued by Georgia-Pacific at one time to customers to reflect discounts.

Now those credit memoranda were sent to the customers just the same way the original invoice was sent, were they not?

A. Yes, they are an invoice.

Q. And the product involved or reference to the invoice was made thereon, was it not?

A. Yes.

Q. And the discount was shown thereon, was it not?

A. Yes, either the total discount or the percentage or whatever, but the discount was shown.

[5340] Q. So as a factual matter, the customer had documentation in his possession which reflected the discount, didn't he?

A. That is correct, sir.

Q. The only difference between putting it on the original invoice and issuing the credit memoranda is he now has two documents instead of one, isn't that correct?

A. That is correct, sir.

Q. Now Mr. Fricano asked you whether you knew whether your competitors followed that practice and you responded yes.

A. Yes.

Q. How did you know that your competitors followed that practice?

A. By checking with dealers, seeing—I have seen the invoices. I have seen photostats of cashier's checks that Mr. Fricano referred to.

Q. And have you seen credit memoranda?

A. Yes, sir.

Q. From the customer?

A. Yes, sir.

Q. So this is information you have been able to verify in the field, isn't that correct?

A. That is correct, sir.

Q. And not with competitors?

[5341] A. That is correct, sir.

• • • • •

[5343] Q. Now, Mr. Burch, am I correct that the Gypsum Division of Georgia-Pacific, during this period that you were the head of the Gypsum Division, or the applicable period, from when you started in June, 1969, as general manager of sales of the Gypsum Division, and through 1973, and even to date—isn't it correct that the Gypsum Division of Georgia-Pacific sold and transferred gypsum board to the distribution centers or branches for resale by those branches?

A. That is correct, sir.

Q. And isn't it also correct that, with respect to the gypsum board sold through these branches, some was shipped directly to the customers, some was shipped to the branches and placed in stock, and then later shipped by the branches to the customer?

A. That is correct, sir.

Q. Is it also correct that each branch was treated as an individual profit center and was charged by Georgia-Pacific for the gypsum board sold through it?

A. Yes, that is true.

Q. Now, I have shown you the list prices, which you have identified, for the Pittsburgh region. Incidentally, Georgia-Pacific Exhibit 461 is a document which is to become [5344] effective—or price list—published price list, to become effective September 16, 1968. Is that correct?

A. That is correct, sir.

Q. And the last exhibit, GP Exhibit, is 468, is the one to become effective in this same Western Pennsylvania, January 1, 1971; is that correct?

A. That is correct.

Q. And the intervening exhibit numbers are intervening published price lists for the Western District of Pennsylvania; is that correct?

A. Yes, sir.

Q. And each of these, of course, relates to gypsum wallboard; does it not?

A. Yes, sir.

Q. Now, would you tell the jury and the Court the basis upon which the distribution centers or branches were charged by the Gypsum Division for the gypsum board sold through these distribution centers during this period?

A. Our distribution centers are charged a—or allowed a basic discount under the current market price or the current sale price. We invoice them, now, at a net figure. At the time indicated here, we invoiced them at the market price figure or our best estimate of the market price figure, and the computer took an automatic discount off of that price.

[3345] For example, if we invoiced them at $40 per thousand square feet for half-inch board in early 1969, or in late 1969, the discount or the branch functional was two five-percent discounts under the $40 figure, which would net out about $36 cost to the branch.

From that difference between $36 and $40, it is assumed that the branches would have to sell the material at $40 per thousand or less, and they must operate their branches, pay for their sales help, pay for their credit risks, off of that four dollars per thousand profit that they retained.

Q. Well, now, so that the branch could tell what the basic charge from which the discount would be, did you issue any price sheets to the branches during this period of time?

A. Yes. We issued an internal price sheet, which we referred to throughout the company as the pink sheet price, and this pink sheet price was our best estimate of the current market price, and then the branch discounts would come off of the pink sheet price.

Q. Well, am I correct, then, that the pink sheet price that you utilized and that you submitted to the branches from time to time in any particular area represented your best judgment of what the market price for gypsum wallboard was in the area served by that branch at any given [3346] time?

A. That is correct, and it could vary during the given periods of time.

Q. All right, sir. Then, the branch's price was a discount off of the pink sheet price; is that correct?

A. That is correct.

Q. And those discounts you have referred to, usually, as two fives, but did that vary from time to time?

A. That varied from time to time.

• • • • •

[3350] By Mr. Mellott:

Q. Now, Mr. Burch, referring to these documents, 469 through 490. Am I correct each of those is a pink sheet to the Pittsburgh branch and that the price to the Pittsburgh branch would have been a discount below that pink sheet price? Is that correct?

A. That's correct, sir.

Q. Now, just looking at one of them as an example, 469, what is the price reflected on there for one-half inch wallboard?

A. $45.40 per thousand square feet.

Q. And was that then Georgia-Pacific's best determination of the market price in the Eastern Central Region of the United States, which covered Pittsburgh, in August 1968 for one-half inch wallboard?

A. Yes, sir.

Q. Now, were these pink sheet prices the same as the published list prices of Georgia-Pacific for the same period?

A. No, sir.

Q. The first list price that we have is Georgia-Pacific Exhibit 461. What is the price for one-half inch wallboard reflected on that sheet?

A. $48.50 per thousand square feet.

Q. All right, sir. Now, was the branch required to direct shipments to sell at the pink sheet price?

[3351] A. No, sir.

Q. So if the branch sold at a price lower than the pink sheet price, it would be simply eliminating or reducing the branch's margin between its transfer price and the pink sheet price; isn't that correct?

A. That's correct, sir.

Q. Now, were the pink sheet prices for a particular branch changed from time to time?

A. Yes, they were.

Q. And were these changes made irrespective of when the published list prices were issued for the area?

A. Yes, sir, that's correct.

• • • • •

[5364] Mr. MELLOTT: If Your Honor please, I offer in evidence GP Exhibit 100.

Mr. FRICANO. Voir dire.

The COURT. All right.

[CROSS-EXAMINATION]

By Mr. FRICANO:

Q. You have stated that as of September 16, 1968, the price represented by that blue line there, your colorful line——

A. This one here, sir——

Q. —is $48.50; is that correct?

Mr. MELLOTT. If the Court please, he stated that the published list price was that.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Doesn't the blue line say published list price, Mr. Burch?

A. Yes, sir, $48.50.

Q. Now, you are wrong, aren't you, Mr. Burch, that that was the price of $48.50?

Have you seen Georgia-Pacific Exhibit—not an exhibit, but the Georgia-Pacific price document date July 31, 1968, rescinding that price?

[5365] A. No. I would like to see it.

Q. I am going to show it to you.

[Mr. Fricano hands a document to the witness.]

Now, tell us what the price is?

The COURT. Is that in evidence, Mr. Fricano?

Mr. FRICANO. No, it is just for purposes of refreshment of recollection at this point, Your Honor. I will give it a number, GX 5006.

The WITNESS. This goes to the states of Connecticut, New Jersey and Pennsylvania, and in the county of Allegheny, and it announces or refers to our letter of July 12, 1968, which is this announcement, and does rescind it.

By Mr. FRICANO:

Q. You are wrong, aren't you, Mr. Burch?

A. It would appear.

Mr. FRICANO. I move to strike the exhibit. It is inaccurate.

The COURT. It is stricken.

Totally ignore the exhibit. It is based on incorrect information.

Take it down, Mr. Keene, please.

[5366] Mr. FRICANO. I further object to any further line of interrogation with respect to the foundation documents. If he wants to use a document he can use a document, but that is it, I respectfully submit.

Mr. MELLOTT. If the Court please, Mr. Fricano on his direct examination of Mr. McCaskill referred to the price increase effective September 16, 1968, and put it on the chart as an announcement that had gone to the trade, which is all we are reflecting. We are not suggesting the published prices were the prices in the marketplace.

The COURT. You cannot put a chart up there that has wrong information on it.

By Mr. MELLOTT:

Q. Georgia-Pacific 461 was issued to the trade, was it not?

A. Yes, it was.

The COURT. It was issued to the trade, but it was rescinded and the chart attempted to compare it to discounted prices which gives a totally incorrect picture. Therefore, it is stricken and we will have no more questions about it.

By Mr. MELLOTT:

Q. Mr. Burch, were the pink sheets which were identified as Georgia-Pacific 469 through 490 in effect for the period reflected by those exhibits?

[5367] A. Yes, sir.

Mr. MELLOTT. May I have the exhibit which the Government had marked, please?

The WITNESS. This one?

Mr. MELLOTT. Could I have just a minute, Your Honor?

The COURT. We will take a 10-minute recess.

[Brief recess.]

Mr. MELLOTT. May I approach the witness, Your Honor?

The COURT. Sure.

By Mr. MELLOTT:

Q. Mr. Burch, I direct your attention to Government Exhibit 5006 and ask you whether you know whether of your own knowledge that the second sheet attached to that exhibit belongs with the front sheet.

A. No, sir, I couldn't say that.

Mr. MELLOTT. Would Your Honor take a look at this document, please, and I direct your attention to the notes at the bottom right-hand corners of the respective sheets.

Those notes, Your Honor, indicate the dates on which there were produced.

The COURT. Produced by whom?

[5368] Mr. MELLOTT. By Georgia-Pacific to the Government, Your Honor.

The COURT. All right. I have seen them.

Mr. MELLOTT. I represent those, Your Honor, those notes indicate these documents were produced, the first page on June 1, 1972, and the second page on December 6, 1971.

By Mr. MELLOTT:

Q. Do you know, Mr. Burch, whether the July 31, 1968 letter actually did cover the Pittsburgh area?

A. No.

Mr. FRICANO. If Your Honor please, I object to this. The document says and Pennsylvania and the witness has just testified on voir dire. I think the Court will take judicial notice Western Pennsylvania is in the State of Pennsylvania, is it not?

Mr. MELLOTT. If the Court please, I submit these two documents were put together by the Government.

Mr. FRICANO. Do we have another charge?

Mr. MELLOTT. The documents themselves reflect that. This witness testified he doesn't know whether they go together.

Mr. FRICANO. If Your Honor please, in [5369] the lower right-hand corner of this exhibit that Mr. Burch testified to reflects a different price, it states clearly, "effective 9-16-68, revised."

Mr. MELLOTT. That document does not indicate it was sent to the trade, Your Honor.

By Mr. MELLOTT:

Q. Mr. Burch, in any event, looking at the second sheet, would you tell me please what that second sheet reflects as the price for one-half inch wallboard in the Pittsburgh area per thousand square feet in shipments of 40,000 pound trucks or above?

A. Well the—you are referring to this Western Pennsylvania area?

Q. Yes, as shown on the second sheet of Government Exhibit 5006.

A. That would be Zone C, 20-ton trucks, $48.25 per thousand square feet.

Q. Now would you look at Georgia-Pacific Exhibit 461 and tell me what the price is on there for the Pittsburgh area?

A. $48.50 per thousand square feet.

Q. A difference of 25 cents per thousand square feet, is that correct?

A. That is correct, sir.

Mr. MELLOTT. If your Honor please, we [5370] did not offer that chart to establish——

The COURT. What chart?

Mr. MELLOTT. Georgia-Pacific Exhibit 100.

The COURT. The one I ordered stricken?

Mr. MELLOTT. Yes.

We did not offer that to establish the published price list ever came into effect. We simply offered the chart to show that the published price list, these lists were actually published to be effective on those dates; that lists are not significant at all in this case. The real question is what was the price in the marketplace.

[5373] • • •

By Mr. MELLOTT:

Q. And, on August 10, as reflected by G–P Exhibit 490, what was the price of one-half-inch regular wallboard?

The COURT. Are they going through all these documents now?

Mr. MELLOTT. No, just the two.

The WITNESS. The pink sheet prices were 45.40 per thousand square feet on August 1, 1968, and effective August 10, 1970, the price was $36.20 per thousand square feet.

By Mr. MELLOTT:

Q. So, during this two-year period, in the Pittsburgh area, the price of one-half-inch gypsum wallboard went down $9.20, did it not, per thousand square feet?

A. That is corect, sir.

Q. Now, Mr. Burch, what was the price competition situation in the marketplace with reference to gypsum wallboard in this period of time?

A. It was extremely competitive and fierce.

Q. And was the Pittsburgh area representative [5374] of the rest of the country in that regard?

A. Yes, sir, the whole country. We were in the midst of a blood bath, price war.

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The COURT. Are you finished with that group that you had there?

Mr. MELLOTT. Yes, Your Honor.

The COURT. All right, take them back.

Mr. MELLOTT. If Your Honor please, since I was unable to read from all of them, could I ask that those go out with the jury, just as we have done on other exhibits, other similar groups?

The COURT. Sure. At the recess, should you send them out with the jury?

Mr. MELLOTT. Thank you, Your Honor.

The COURT. I don't think you attempted to go through all of them; did you?

Mr. MELLOTT. Well, Your Honor, I would like to have referred to the prices on each one of those, to [5375] show the movement.